TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914.

No. [illegible] 188

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WESTERN UNION TELEGRAPH COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 24, 1915.

(23,719)

(23,719)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1144.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WESTERN UNION TELEGRAPH COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 10, 1913.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November twenty-first, A. D. 1912, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Hon. William B. Sheppard, District Judge.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
versus
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 27th day of December, A. D. 1912, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3458, as follows:

UNITED STATES OF AMERICA.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

versus No. 14,528.

WESTERN UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

Messrs. Denegre & Blair, for the Louisville & Nashville Railroad Company, Plaintiff in Error.

Messrs. Howe, Fenner, Spencer & Cocke, for the Western Union Telegraph Company, Defendant in Error.

WRIT OF ERROR to the United States District Court for the Eastern District of Louisiana, New Orleans Division, from the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the twenty-ninth (29th) day of November, A. D. 1912, at the City of New Orleans, State of Louisiana.

TRANSCRIPT OF RECORD.

EXTRACTS FROM TRANSCRIPT OF REMOVAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, LOUISIANA, DIVISION "D," TO THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA.

Filed June 29th, 1912.

State of Louisiana,
Parish of Orleans,
City of New Orleans.

Civil District Court for the Parish of Orleans.

PETITION AND THREE EXHIBITS.

Filed April 12th, 1912.

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Civil District Court, Division "D."

To the Honorable the Judge of the Civil District Court in and for the Parish of Orleans:

The petition of the Western Union Telegraph Company, a corporation organized and existing under the laws of the State of New York, domiciled in the City of New York, in said State, and doing business in the State of Louisiana, having its principal office in the said State in the City of New Orleans, respectfully represents:

That petitioner is a corporation organized and existing under the laws of the State of New York, for the purpose of transmitting intelligence by magnetic telegraph, and has constructed and maintained, and is constructing and maintaining telegraph lines through the various states of the United States and in the State of Louisiana necessary to transmit intelligence along the highways and over the waters and through the parishes of the State of Louisiana, and more particularly the Parishes of Orleans and St. Tammany.

That petitioner is duly qualified by law to institute these proceedings, and has filed in the office of the secretary of state of Louisiana all of the documents and instruments required by law for the purpose of authorizing it to do business in the State of Louisiana, and has named and appointed T. P. Cummings as its agent for the service of process in the State of Louisiana.

2 That the Louisville & Nashville Railroad Company is a corporation organized and existing under the laws of the State of Kentucky, domiciled in the City of Louisville, in the said State, and doing business in the said state in the City of New Orleans, and had named Charles Marshall and A. J. Jacobs its agents in said state for the service of process.

That the said Louisville & Nashville Railroad Company is engaged in and is carrying on the business of a common carrier by railroad of passengers and freight through various states and in and through the State of Louisiana, and more particularly in and through the Parishes of Orleans and St. Tammany in said state.

That the said defendant, the Louisville & Nashville Railroad Company, in the operation of its railroad, has acquired and owns a strip of ground or right of way over which it operates its said railroad, varying in width from sixty to one hundred feet, beginning at a point in the City of New Orleans, at the intersection of the property lines at the corner of Elysian Fields Street and Laforce Street (now North Tonti Street) in square No. 1210, and running thence in an easterly direction and forming a continuous strip of ground through the Parishes of Orleans and St. Tammany to the thread of the steam [stream] known as Pearl River, the dividing line between the States of Louisiana and Mississippi, a distance of 35.38 miles.

That the strip of ground or right of way 28.93 miles in length lines in the Parish of Orleans and 6.45 miles lines in the Parish of St. Tammany in this state.

That on said strip of ground or right of way said defendant has constructed and operates a railroad, and at various places thereon has constructed necessary appurtenances, consisting of side tracks, station houses, depots and section houses, and where the line of said railroad crosses navigable streams or bodies of water, bridges have been constructed, notably where

said railroad crosses the streams known as the "Little Rigolets" and "Rigolets."

That the location of said right of way and of the said railroad constructed thereon, and of the improvements, structures and bridges thereon, are fully shown on the plat or plan filed herewith as a part hereof, and marked for identification "Exhibit "A."

That may [many] years ago, with the consent of the defendant, the plaintiff constructed and has ever since maintained, and now maintains, a line of telegraph poles and wires and other appurtenances thereto over and along said strip of ground or right of way, and over and along the bridges of the said defendant crossing the streams as "Little Rigolets" and "Rigolets" respectively, as shown on the plan or plat marked "Exhibit "A" as aforesaid, said poles being located at approximately a distance of 91.65 feet apart, and at a distance from the center of the main line of defendants railroad as shown on the profile filed herewith as a part hereof and marked "Exhibit B."

That the right so to maintain the said line, with the consent of the defendant, will expire and terminate on the 17th day of August, 1912, and through [though] the plaintiff endeavored and offered to agree with the defendant as to the value of the use or servitude enjoyed by the plaintiff on the said strip of ground or right of way and on the said bridges for the purpose of maintaining its said line of telegraph, the defendant has refused to agree with the plaintiff as to the terms and conditions upon which it may continue to enjoy the said use or servitude, and has refused to permit the enjoyment by the plaintiff of the use or servitude after the expiration of the license under which the said use has been heretofore enjoyed, to-wit, August 17th, 1912.

That petitioner being a corporation organized for the purpose of transmitting intelligence by magnetic telegraph is, under and by virtue of the State of Louisiana, authorized and empowered to expropriate the right to construct and maintain its lines along and parallel to any railroad in the state, when such right is necessary for the construction, working, operating and maintaining of its telegraph line, and when it cannot secure such right by consent, contract or agreement upon such reasonable terms, provided, that the ordinary use of such railroad be not thereby obstructed.

That it is necessary for the constructing, working, operating and maintaining of plaintiff's telegraph line that it should have the right to erect and maintain its telegraph
4 poles, wires and appurtenances along and parallel to the line of railroad and upon the right of way and the bridges crossing the streams as "Little Rigolets" and "Rigolets" belonging to the defendant company, the location of the said poles, wires and appurtenances constituting plaintiff's telegraph line being fully shown on the map and profile heretofore referred to and filed herewith as a part hereof, marked "Exhibit A" and "Exhibit B" respectively.

That the ordinary use of the defendant's railroad will not be thereby obstructed.

That petitioner therefore desires to expropriate such right.

That petitioner does not seek to acquire the fee to any of the lands or bridges included in the right of way of the defendant, or the right to use the same for any other purpose than to erect poles with cross-arms thereon and to string wires for the use in transmission of intelligence be [by] magnetic telegraph as aforesaid, and petitioner proposes to maintain and repair the said poles, cross-arms, wires and appurtenances as may from time to time be necessary and to erect and maintain only one line of poles with cross-arms thereon for such purposes.

That said poles are to be not less than thirty feet long and not less than twenty inches in diameter at the base, and, except in the case of the poles on the bridges aforesaid, are to be set in the ground to a depth of not less than six feet in such manner as to hold firmly in position.

That on the bridges crossing the streams known as "Little Rigolets" and "Rigolets" respectively, the poles are to be fastened and attached as shown on the sketch filed herewith as part hereof and marked "Exhibit C."

That the number of the said poles is not to exceed forty (40) to the mile, and they all to be securely and properly braced, and the cross-arms are to be about eight or ten feet in length, extending from four to five feet on each side of the said poles near the top.

That all of the materials used by your petitioners are to be the best, and the said line is to be constructed upon
5 the most approved plan known or used in this country.

Petitioner further stipulates and agrees that if at any time in the future, after the erection of its said poles cross-arms and wires, or after its acquisition in this proceedings of the right to maintain its poles, cross-arms and wires as presently constructed, it should become reasonably necessary for the said defendant to change the location of its tracks or to construct new tracks or side tracks where the same do not now exist, and for such purpose to use and occupy that portion of the said right of way on which petitioner's poles are, or may be set, petitioner will, at its own expense, upon reasonable notice from the defendant, remove the said poles, cross-arms and wires to such other point or points on the said defendant's right of way as may be reasonably necessary in order not to obstruct the use by the said defendant of its property.

Petitioner recognizes fully the dominant right of the defendant in the said right of way and bridges, and seeks in this proceeding to condemn merely and [an] easement or servitude over the same for the construction, operation, maintenance and repair of its telegraph lines, the said easement or servitude to be used now and in the future in such way as not to interfere with the proper and necessary use of the same by the said defendant for railroad purposes.

Wherefore, the premises considered, petitioner prays for an order directing the clerk of this Honorable Court to give notice to the said Louisville & Nashville Railroad Company, defendant, in accordance with law, and that a copy of this petition and the order rendered thereon, together with a notice of the time at which a jury shall be impaneled to assess the value of the right claimed in this petition, may be served on the Louisville & Nashville Railroad Company, and that thereafter a jury of freeholders may be impaneled in the manner provided by law to fix an [and] assess the value of the said right sought to be expropriated herein and fully described in this petition and in the exhibits annexed hereto, and to determine the damage, if any, the railroad company will sustain in the premises and after due proceedings, for judgment expropriation in favor of petitioner and against the defendant the right of use for a telegraph line as aforesaid over the right of way, bridges and property of the defendant company in the form, to the extent and within the limitations described in the foregoing petition and the exhibits annexed thereto.

6

And that the sum due by petitioner to the said railroad company for the said right to determined [determine] and decreed to be paid to the said railroad company as pointed out by law.

And petitioner prays for all general and equitable relief.

(Signed) HOWE, FENNER, SPENCER & COCKE & B. J. MAYER,
Attorneys for Petitioner.

ORDER.

The foregoing petition being considered, it is ordered that the clerk of the Civil District Court for the Parish of Orleans give notice, according to law, to the defendant, the Louisville & Nashville Railroad Company, through one of its agents in this state for the service of process, Charles Marshall and A. J. Jacobs, of the within petitioner of the Western Union Telegraph Company to expropriate the right to construct, maintain and operate a line of telegraph along and upon the defendant's right of way and bridges in the Parishes of Orleans and St. Tammany in this state, at the location, to the extent and subject to the limitations set forth in the said petition and annexed documents, delivering also to the said defendant, through one of its said agents, a copy of the said petition and of this order.

It is further ordered that the clerk of the Civil District Court for the Parish of Orleans make, according to law, a list of forty-eight freeholders, residents of the Parish of Orleans and not interested in the issues to be tried between the said Western Union Telegraph Company, and the said Louisville & Nashville Railroad Company, and proceed to draw therefrom twenty-four as jurors and to summon them to attend at the Civil District Court for the Parish of Orleans in Division "D" thereof, in the City of New Orleans, to serve as jurors herein, on the 6th day of May, 1912, at eleven o'clock A. M., observing, however, to give them full ten days to appear from the date of the summons.

New Orleans, April 12th, 1912.

(Signed) PORTER PARKER, Judge.

7 EXCEPTION TO NOTICE.

Filed May 20th, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Now into court, appearing solely for the purpose of this exception, comes the Louisville & Nashville Railroad Company and excepts to the notice herein served on exceptor, dated April 12th, 1912, and says the same is illegal, null and void, and for cause of exception says:

(1) That said notice purports to advise exceptor that a jury of freeholders will be impaneled to assess the value of land described in the petition of the City of New Orleans directed against exceptor.

(2) That in fact, as appears by the return of the sheriff herein, no such copy of such petition accompanied said notice and said notice is accordingly fatally defective.

(3) That said notice was wholly unauthorized and invalid for the reason that the City of New Orleans has no right to describe or select the land of which the value is to be assessed herein.

(4) That if it be claimed that said notice is a valid notice of intention to assess the value of the land described in the petition of the Western Union Telegraph Company of which (as shown by the sheriff's return) a copy actually accompanied said notice, exceptor says that on the contrary said notice was and is utterly null and void for such purpose, as it expressly refers to a petition of the City of New Orleans, of which, the record shows, no copy was ever served herein on petitioner; that exceptor is entitled to a notice complete in itself and to have the petitioner correctly named and cannot be compelled to search the records before answering to discover whether such petition has been in fact filed and is really meant.

8 (5) That as basis for proceedings (if such be sought to be had) anywhere else than in the court-house building at the corner of St. Anne and Chartres Streets, said notice is fatally defective, as it names that place only as the place where the proceedings will be had; and as a basis for proceedings (if any be sought to be had) at that place said notice is defective, inasmuch as said place is not a place where the Civil District Court is authorized by law to be held.

(6) That the date May 6th, 1912, for impaneling of jury stated in said notice is illegal as plainly contrary to Section 1481 of the Revised Statutes of Louisiana.

Wherefore, exceptor prays that after all proper proceedings these exceptions may be maintained and said notice declared null and void and all proceedings herein stayed.

(Signed) DENEGRE & BLAIR & VICTOR LEOVY,
Attorneys for Louisville & Nashville R. R. Co.

9 EXCEPTIONS MAINTAINED.

Extract From the Minutes of Division "D."

Monday, May 20th, 1912.

Present: Hon. Porter Parker, Judge.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Exception to notice herein filed this day by the defendant was argued by counsel of record herein and the Court considering the law to be in favor of exceptor for the reasons orally assigned, it is ordered by the Court that said exceptions be maintained and that the hereinbefore issued notice be quashed, with leave to defendant to issue new notices.

10 SUPPLEMENTAL AND AMENDED PETITION AND ORDER.

Filed May 21st, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

To the Honorable the Judge of Division "D" of the Civil District Court in and for the Parish of Orleans:

The supplemental and amended petition of the Western Union Telegraph Company herein with respect shows:

That the plaintiff has duly and formally accepted the provisions of the act of Congress entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24th, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby.

That in view of the exceptions filed by the defendant herein and maintained by the Court to the form of the notice served upon it of the date upon which the jury would be impaneled to assess the value of the easement described in the plaintiff's petition, and to the date upon which in said order heretofore rendered the jurors were summoned to attend in accordance with Article 2632 of the Revised Civil Code, petitioner desires that another order be rendered by this Honorable Court in the premises.

Wherefore, the premises considered, petitioner prays:

That leave be granted to it to file this supplemental and amended petition.

That the clerk of this Court be ordered to make, according to law a list of the forty-eight freeholders, residents of the Parish of Orleans and not interested in the issues and to be tried between the plaintiff and the defendant, and proceed to draw therefrom twenty-four as jurors and to summon them to attend at Division "D" of this Honorable Court in the

City of New Orleans, to serve as jurors herein on
11 the tenth day after the date of the said summons;
or, if that day be one of public rest, on the 11th day after the date of the said summons, and that the said clerk of this Court be further ordered to give notice, according to law, to the defendant, the Louisville & Nashville Railroad Company, through one of its agents in this state for the service of process, Charles Marshall and A. J. Jacobs, of the original and of this supplemental petition of the plaintiff to expropriate the right to construct, maintain and operate a line of telegraph along and upon the defendant's right of way and bridges in the Parishes or [of] Orleans and St. Tammany in this state, at the location, to the extent, and subject to the limitations set forth in the said original and supplemental and amended petitions, and annexed documents, delivering also to the said defendant, through one of its agents, a copy of the original petition filed herein and of this supplemental petition, and of the order aforesaid.

Petitioner further prays for judgment otherwise as prayed for in its original petition, and for such general and equitable relief as it may be entitled to in the premises.

(Signed) HOWE, FENNER, SPENCER,
COCKE & B. J. MAYER,
Attorneys for Petitioner.

ORDER.

Let the foregoing supplemental and amended petition be filed in according to law.

And the original petition herein and the said supplemental and amended petition being considered, it is ordered that the clerk of the Civil District Court for the Parish of Orleans make, according to law, a list of forty-eight freeholders, residents of the Parish of Orleans and not interested in the issues to be tried between the Western Union Telegraph Company and the Louisville and Nashville Railroad Company, and proceed to draw therefrom twenty-four as jurors and to summon them to attend at the Civil District Court for the Parish of Orleans in Division "D" thereof in the City of New Orleans, to serve as jurors herein on the tenth day after the date of the said summons, or, if that day be one of public rest, on the

eleventh day after the date of the said summons at eleven o'clock A. M.

It is further ordered that the said clerk of the Civil District Court for the Parish of Orleans give notice, according to law, to the defendant, the Louisville & Nashville Railroad Company, through one of its agents in this state for the service of process, Charles Marshall and A. J. Jacobs, of the original and supplemental petitions of the Western Union Telegraph Company, filed herein to expropriate the right to contract, maintain and operate a line of telegraph along and upon the defendant's right of way and bridges in the Parishes
12 of Orleans and St. Tammany in this state, at the location, to the extent and subject to the limitations set forth in the said original and supplemental and amended petition and annexed documents, delivering to the said defendant, through one of its agents, copies of the said original and supplemental petitions and of this order.

Done and signed at New Orleans on this 21st day of May, 1912. (Signed) PORTER PARKER, Judge.

13 SUPPLEMENTAL AND AMENDED PETITION AND ORDER, AND SHERIFF'S RETURN THEREON.

Filed May 30th, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

To the Judge of Division "D" of the Civil District Court in and for the Parish of Orleans:

The supplemental and amended petition of the Western Union Telegraph Company, plaintiff in the above entitled and numbered cause, with respect represents:

That the value of the right of way or easement sought to be expropriated in this suit and, therefore, the amount in controversy is much less than three thousand ($3000); that the

value of said easement does not exceed the sum of two hundred dollars ($200).

Wherefore, the premises considered, petitioner prays for leave to file this petition, and that a copy thereof be served upon the defendant in accordance with law.

(Signed) HOWE, FENNER, SPENCER, COCKE & B. J. MEYER,
Attorneys for Petitioner.

ORDER.

Let the foregoing amended petition be filed, and let a copy thereof be served on the defendant in accordance with law.

New Orleans, May 30th, 1912.

(Signed) PORTER PARKER, Judge.

Received Thursday, May 30th, 1912, and on the 31st day of May, 1912, I served a copy of the within supplemental and amended petition and order on Louisville and Nashville Railroad Company, defendant herein, by leaving the same at their office at the foot of Girod Street in the hands of Mr. Andrew J. Jacobs, clerk, Mr. Charles Marshall, its duly authorized agent, being absent from the office at the time of said service, all of which facts I learned by interrogating said Mr. Andrew J. Jacobs, clerk.

(Signed) E. E. CHIAELLOT,
Dy. Sheriff.

Returned same day. Sheriff fees 50c.

14 EXCEPTION OF JURISDICTION.

Filed June 4th, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Now into court, after the action of the Court in refusing to sign the order for removal herein and after the Court had

stated that it would, over defendant's protest, continue to act in this cause, comes the defendant, the Louisville & Nashville Railroad Company, appearing solely as aforesaid and solely for the purpose of this exception and by way of exception to the jurisdiction of this Court repeats and reserves its objections to the Court farther proceedings herein.

Wherefore, exceptor prays that this exception may be maintained and that this Honorable Court cease from further proceedings in this cause.

(Signed) DENEGRE, BLAIR & VICTOR LEOVY, Attys. for Deft.

15 EXCEPTION OF VAGUENESS AND FIVE EXHIBITS.

Filed June 4th, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Now comes the Louisville and Nashville Railroad Company, after the overruling of its exception to the jurisdiction herein and under protest and compulsion, as stated in said exception, and appearing solely for the purpose of filing exception, excepts to the petition herein on the following grounds:

(1) That said petition fails to state whether the license or right by which it claims now to be on defendant's property and remain there until August 17th, 1912, is verbal or in writing and the terms thereof, and the exceptor states that it desires to pray oyer of such contract or permit if in writing.

(2) That said petition is further vague and indefinite in this: that the description of the property and rights to be taken is too vague and indefinite, and specially that said petition contains no full description of defendant's property, nor of the improvements thereon.

(3) That said petition is vague and indefinite as to the time when the right to be expropriated is to begin.

And in case the above exception be overruled, exceptor pleads under protest as best it can with the disadvantage of not having the alleged license or right set forth in full, that even by the vague allegations it appears that this suit is premature and that the alleged right to expropriate said land, being inconsistent with the alleged right until August 17th, 1912, to remain thereon by agreement. Such a suit at this time being inconsistent with the plaintiff's position as tenant.

And in case the last above exception be overruled on the face of the papers, exceptor repeats the same by way of an exception, pleading a special plea, and annexes hereto a copy of said contract and makes the same part thereof; and in case the above exceptions be overruled exceptor excepts that the petition does not allege inability to agree as to present value of right to be expropriated, and does not show present necessity for expropriating and does not show present necessity for expropriating, but the contrary; and the expropriation cannot be had for future taking.

Wherefore, exceptor prays that after all proper proceedings, these exceptions may be maintained and plaintiff's suit dismissed.

(Signed) DENEGRE, BLAIR AND VICTOR LEOVY, Attys. for Deft.

16 AFFIDAVIT OF J. H. ELLIS.

Filed June 4th, 1912.

Fulton Superior Court, March Term, 1912.

Louisville & Nashville Railroad Co.
vs. No. 24721.
Western Union Telegraph Co.

Petition for Injunction, &c.

State of Kentucky,
County of Jefferson.

In person before me comes J. H. Ellis, who, very duly sworn

in the above cause, deposes and says he is custodian of the original contracts between complainant, Louisville & Nashville Railroad Company, and the defendant, Western Union Telegraph Company, being secretary of the former company, and now herewith files as part hereof the original contract between said companies dated May 31st, 1876, marked No. 88; and the original contract between said companies as part hereof, dated May 14th, 1880, marked No. 201; and the original contract between said two companies as part hereof, marked June 18th, 1884, marked No. 357-1; and also the original of the notice, marked "Notice," given by the Western Union Telegraph Company to the Louisville & Nashville Railroad Company dated August 11th, 1911, received by M. H. Smith, president, August 17th, 1911, terminating the last mentioned contract given herein, to-wit, August 17th, 1912.

(Signed) J. H. ELLIS.

Sworn to and subscribed before me this 28th day of February, 1912.

(Signed) G. W. B. OLMSTEAD,
[Seal] Notary Public, Jefferson County, Kentucky.

On reverse: Superior Court, Fulton County, Georgia. March term, 1912. No. 24721. Louisville & Nashville Railroad Co. vs. Western Union Telegraph Company. Affidavit of J. H. Ellis.

17 NOTICE.

Filed June 4th, 1912.

The Western Union Telegraph Company,
195 Broadway.

"Notice"

Newcomb Carlton,
Vice President. New York August 11th, 1911.

To the Louisville & Nashville Railroad Company,
Louisville, Ky.

Gentlemen:

Please take notice that upon the expiration of one year from the date of delivery hereof to you, this company will

terminate its agreement with the Louisville & Nashville Railroad Company, dated the eighteenth day of June, 1884.

This notice is given in accordance with the provisions of the Twelfth Section of said agreement, which provides for its termination at any time after twenty-five years from and after the first day of July, 1884, upon the expiration of one year after written notice shall have been given by one of the parties to the other of a desire or intention to terminate the same. (Signed) THE WESTERN UNION TELEGRAPH COMPANY,
By NEWCOMB CARLTON,
Vice President.

Mr. J. R. Terhune,
Supt. Western Union Tel. Co.
Dear Sir:

I hereby acknowledge receipt of copy of above notice dated New York, Aug. 11th, advising of the Western Union Telegraph Company's intention to terminate agreement with L. & N. R. R. dated the eighteenth day of June, 1884.

(Sig.) LOUISVILLE & NASHVILLE R. R. CO.,
By M. H. SMITH, President.
E. S. LOCKE.

Presented in person by J. R. Terhune, and acknowledgment signed and witnessed. Aug. 17-1911.

18 CONTRACT NO. 88.

Filed June 4th, 1912.

This agreement made and entered into this 31st day of May, 1876, by and between the Louisville & Nashville Railroad Company, hereinafter designated the Railroad Company, party of the first part, and the Western Union Telegraph Company, hereinafter designated the Telegraph Company, party of the second part, witnesseth:

Whereas, the present contract relations of the parties hereto comprised in sundry contracts made between parties and companies whose properties and franchises have been absorbed

by and now compose a portion of the roads operated by the Railroad Company and sundry parties and companies whose property and franchises have been absorbed by and now compose a portion of the line operated by the Telegraph Company are found to be inadequate to meet the enlarged wants of either party hereto.

And whereas, the parties hereto have not been above to agree on a general contract that shall entirely supersede and annul existing agreements between the parties hereto by their respective predecessors but have agreed on certain modifications for the period herein named which shall so far as stipulated supersede any provisions of existing contracts with which they conflict; but on the termination of this agreement as herein provided all existing contracts shall be revived in force as if this agreement had not been made.

Now, therefore, for and in consideration of the mutual covenants and agreements herein stipulated it is covenanted and agreed that the mutual covenants and respective undertakings of the parties hereto in all existing contracts between said parties and their respective predecessors in respect to matters related herein and for an [and] during the period provided herein shall be and the same are hereby modified and amended as follows, to-wit:

Exclusive Right of Way—Transport of Material for Other Tel. Co.:

First. The Railroad Company grants and agrees to assure to the Telegraph Company so far as it legally may an exclusive right of way on and along the line and lands of all roads now owned, leased or operated by the said Railroad Company, or which it may hereafter
19 own, control or operate for the construction and use of telegraph lines for commercial or public uses or business; and said Railroad Company will not transport material for the construction of any line of telegraph in competition with the lines of said Telegraph Company, except at and for its regular local tariff rates, nor will it furnish for such competing lines facilities or assistance which it may lawfully withhold, nor stop its trains nor distribute material thereof at other than regular stations.

Transportation of Men and Material of W. U. Co.

Second. The Railroad Company will transport over any of its roads free of charge all officers and employees of the Telegraph Company when travelling on the business of the Company; and will also transport free of charge and distribute at points required, all poles, wire insulators, brackets and all other material to be used in the construction, reconstruction, maintenance, repair and operation of lines on said roads; and will transport any material for the use of said Telegraph Company on its lines beyond said roads free of charge to the amount of three thousand dollars per annum computed at the local freight charges of said Railroad Company and for any excess of said amount of three thousand dollars per annum the Railroad Company will charge one-half its local rates.

Labor of Maintenance and Current Repairs of Telegraph—Labor of Reconstruction.

Third. The Railroad Company shall furnish on the request of a superintendent or foreman of the Telegraph Company all the unskilled labor necessary for the maintenance and ordinary current repairs of said lines of telegraph, such repairs to include the necessary renewal of poles not to exceed one new pole for every mile of road operated by said Railroad Company in any one year until the lines shall require reconstruction, but for general reconstruction and renewal of poles the Telegraph Company shall provide the labor, the Railroad Company furnishing transportation and distribution of material as aforesaid.

Supply of Foreman and Material, Etc.—Transmission of Company's Messages—Accounting for Receipts—Free Messages—Delivery of Messages—Liability as to Transmission of Messages.

Fourth. The Telegraph Company shall furnish all material for the construction, reconstruction, repair, maintenance and operation of the lines of telegraph herein provided for, and also a superintendent or competent

foreman to direct the labor necessary to their use; and shall furnish all instruments, battery material and stationery necessary to the maintenance and
20 operation of such telegraph stations as the Railroad Company may deem proper to establish; and at all telegraph stations on their roads established and maintained by the Railroad Company except depot stations at terminal points its employes shall receive, transmit and deliver promptly such commercial or paid messages as may be offered at the tariff rates of said Telegraph Company, and shall render monthly statements of such business and full accounts of all receipts therefrom, and shall pay such receipts to said Telegraph Company in such manner as the Telegraph Company may direct, and shall not, unless by order of said Telegraph Company, transmit over said telegraph lines any free messages, except those herein provided for, and concerning all such business, whether paid or free, shall conform to all rules and regulations of said Telegraph Company applicable thereto.

Provided, said railroad offices shall be entitled to make special deliveries at the cost of the addressee at greater distances than on half of a mile from the office.

It is a condition of this contract that said Railroad Company shall not be held liable to any person doing business with said Telegraph Company for any neglect or failure in the transmission or delivery of messages, and said Telegraph Company shall not be responsible for any error or failure in the transmission or delivery of messages sent free for said Railroad Company under this agreement.

Railroad Company to Furnish Accommodations at Stations—One Operator for Both Companies Without Charge to Railroad—Whenever One Operator Insufficient for Both.

Fifth. The Telegraph Company may establish and maintain such offices on the line of said roads as it shall deem expedient, and when said Telegraph Company elects to establish an office at a station of said Railroad Company then said Railroad Company, if it have room to do so, shall furnish suitable accommodations in such station free of rent; and if at such station one person can attend to

the telegraph business of both companies, the Telegraph Company shall do the business of the Railroad Company without charge; and the operator at such station shall be subject to the directions of the chief operator of the Railroad Company so far as railroad business is concerned, but whenever the business of any such office be-
21 comes so large that more than one operator is needed to do the business of both companies, then said Railroad Company will employ its own operator.

Railroad Wires and Precedence of Messages on Other Wires.

Sixth. One wire shall be set apart for the preferential use of the Railroad Company along the entire length of all its roads except along branch roads, where only one wire is maintained and on such wires along said branch roads the important business only of the Railroad Company relating to the movement of its trains, accidents and damage to road shall have precedence; otherwise, the business of both companies shall have equal facilities thereon.

Additional Wires.

Seventh. And it is further agreed that if the Railroad Company should at any time require greater wire facilities on any portion of its roads than are herein provided the Telegraph Company will furnish an additional wire at the cost price thereof upon its poles, or the Railroad Company may at its own cost string said additional wire upon the Telegraph Company's poles.

Free Messages—Franks—Limitations of Franks.

Eighth. Upon the wires thus set apart for the preferential use of the Railroad Company the said Railroad Company's business and also the family and social messages of its officers and agents may be sent free, but all other business except that which is ordered to be sent free by the Telegraph Company shall be charged for and the proceeds remitted as hereinbefore provided.

The Telegraph Company will also furnish franks on

application of the president or general superintendent of the Railroad Company to all officers and agents of said Railroad Company so applied for on authority of which franks messages on the business of said Railroad Company shall be sent over all lines of the Telegraph Company free of charge to the extent of six thousand dollars per year at the regular commercial tariff of said Telegraph Company. Tolls to be computed between the points at which such messages originate and their destination, and for any such telegraph service in excess of six thousand dollars per year the Telegraph Company will charge and the Railroad Company will pay one-half the regular commercial rates, settlements to be made annually.

22 Period of Agreement.

Ninth. This agreement to take effect and be in force from and after its execution and to continue for the term of five years from and after the first day of July eighteen hundred and seventy-six and thereafter until six months notice in writing shall have been given by one of the parties hereto to the other of a desire or intention to terminate the same.

In witness whereof the parties to these presents have caused the name of their respective presidents to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

(Signed) THE LOUISVILLE & NASHVILLE R. R. CO.
By E. D. STANDIFORD,
President. [Seal]
THE WESTERN UNION TELEGRAPH CO.
By WILL M. ORTON,
President. [Seal]
A. R. BREWER, Secretary.

On Reverse: No. 88. 1876, May 31. Western Union Tel. Co. Agreement between Louisv. & Nashv. R. R. Co. and W. U. Tel. Co. Dates. 88 Contract.

23 CONTRACT NO. 201.

Filed June 4th, 1912.

This agreement made and entered into this fourteenth day of May, 1880, by and between the Louisville & Nashville Railroad Company, acting for itself and for other railroad companies connected with or forming part of what is popularly known as the "Louisville & Nashville Railroad System," viz.:

The Nashville, Chattanooga & St. Louis Railroad Company,

The South & North Alabama Railroad Company,

The Mobile & Montgomery Railroad Company, and

The New Orleans & Mobile Railroad Company;

together with the sundry branches and connections of each of the same of the first part, hereinafter designated as the Railroad Company, and the Western Union Telegraph Company, of the second part, hereinafter designated as the Telegraph Company, witnesseth:

That, whereas, the existing contract relations of the parties hereto comprised in sundry contracts made between the certain parties and companies whose properties and franchises have been absorbed by and now compose a portion of the roads operated by the Railroad Company and the certain parties and companies whose property and franchises have been absorbed by and now compose a portion of the lines operated by the Telegraph Company are found to be inadequate to meet the enlarged wants of either party hereto;

Now, therefore, for and in consideration of the mutual covenants and agreements herein stipulated, it is covenanted and agreed by and between the parties hereto as follows:

First. This agreement shall apply as between the Telegraph Company and the several railroad companies represented by the said Louisville and Nashville Railroad Company of the first part, and shall extend to the railroads, and any branches or extensions thereof now or hereafter constructed, between Louisville, Ky., and New Orleans, La., via Nashville, Decatur, Montgomery and Mobile, and including the following roads and branches, viz.:

The Knoxville, Richmond, Greensburg, Bardstown,

24 Cecilian and Glasgow branches, and the Clarksville and Memphis Divisions of the Louisville and Nash-

ville Railroad, and the road from Owensboro to Owensboro Junction, Ky.;

The roads formerly operated by the St. Louis and South Eastern Railroad Company between Edgefield Junction, Tenn. and Henderson, Ky. and between Evansville, Ind. and St. Louis, Mo., including the Shawneetown branch thereof.

The roads operated by the Nashville, Chattanooga & St. Louis Railroad Company between Nashville and Chattanooga, Tenn. and between Nashville, Tenn. and Hickman, Ky., including the Shelbyville, Fayetteville, McMinnville, Jasper and Tuscaloosa branches;

The Tennessee and Pacific, the Duck River Valley and the Nashville and Florence Railroads;

The Wetumpka branch of the South and North Alabama Railroad, and that portion of the Western Railroad of Alabama between Selma and Montgomery, Ala., the Pensacola Railroad, and the Pensacola and Selma Railroad.

Second. The Railroad Company so far as it legally may hereby grants and agrees to assure to the Telegraph Company the exclusive right of way on and along the line, lands and bridges of all roads now owned, leased, controlled or operated by the said railroad companies constituting the said Railroad Company of the first part, or which it or they may hereafter own, lease, control or operate, for the construction and use of such lines of poles and wires for commercial or public uses or business as the Telegraph Company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business, and said Railroad Company will not transport men or material for the construction or operation of any line of telegraph in competition with the lines of said Telegraph Company party hereto except at and for the Railroad Company's regular local tariff rates, nor will it furnish for any such competing line or lines any facilities or assistance which it may lawfully withhold, nor stop its trains nor distribute material therefor at other than regular
25 stations.

Provided, always that in protecting and defending the exclusive grants conveyed by this clause the Telegraph Company may use and proceed in the corporate name of the appropriate company or companies constituting the Railroad Company of the first part, but shall indemnify and save harm-

less the Railroad Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

Third. The Railroad Company agrees to transport free of charge over any of its roads all officers and employes of the Telegraph Company, when travelling on the business of the said company, and also to transport free of charge and distribute along its said roads at the points required, all poles, wire, insulators, brackets, and all other material of the Telegraph Company to be used in the construction, reconstruction, maintenance, repair and operation of its telegraph lines and wires on the system of roads covered by this agreement, and all supplies and other material for the establishment and maintenance of the offices thereon; and the Railroad Company also agrees to transport free of charge all poles and other material for the use of said Telegraph Company on its lines beyond or off the system of roads covered by this agreement to an amount computed at the local freight charges of said Railroad Company not exceeding one-half of the amount of free telegraph service which the Telegraph Company may perform for the Railroad Company beyond the system of roads covered by this agreement, the tolls for said free telegraph service to be computed at the regular day rates of the Telegraph Company between the points at which the messages of the Railroad Company may originate and the points to which they may be destined. Settlements to be made at the end of each year. All of such transportation shall be furnished by the Railroad Company with reasonable promptness upon application of the superintendent or other officer of the Telegraph Company.

26 Fourth. The Railroad Company shall furnish on the request of a superintendent or foreman of the Telegraph Company all the unskilled labor necessary for the maintenance and ordinary current repairs of the Telegraph Company's lines of telegraph on said roads, such repairs to include the necessary renewal of poles not to exceed an average of one new pole for every mile of road operated by said Railroad Company in any one year until the lines shall require reconstruction, but for general reconstruction and renewal of poles the Telegraph Company shall supply the labor, the Railroad

Company furnishing transportation and distribution of material as aforesaid.

Fifth. The Telegraph Company agrees to furnish all material for the maintenance, repairs and reconstruction of its lines and wires along said railroads and a competent foreman to direct the labor which the Railroad Company hereinbefore agrees to furnish. The Telegraph Company agrees to furnish on six months written notice all labor and material and to construct a line of telegraph on any road or branch now or hereafter owned, controlled or operated by the Railroad Company on which there may be no line of telegraph.

The telegraph Company further agrees to furnish instruments, and local batteries, and material to maintain said batteries and blank forms and stationery for commercial business for the establishment, maintenance and operation of the telegraph offices on and along said railroads. The Telegraph Company will also furnish the use of its main batteries for the successful operation of its wires along said railroads, including the wires set apart for the use of the Railroad Company.

At all telegraph stations of the Railroad Company, except at depot stations at terminal points, its employes acting as agents of the Telegraph Company shall receive, transmit and deliver promptly such commercial or paid messages as may be offered at the tariff rates of said Telegraph Company, and shall render to said company monthly statements of such business and full accounts of all receipts to said Telegraph Company at such times and in such manner as the Telegraph Company may direct, and said employes shall not, without the consent of said Telegraph Company, transmit over said tele-
27 graph lines any free messages except those herein provided for and concerning all telegraph business, whether paid or free, shall conform to all rules and regulations of said Telegraph Company applicable thereto.

Provided, said railroad employes shall be entitled to make special deliveries at the cost of the addressee at greater distances than one-half of a mile from the offices.

It is a condition of this contract that said Railroad Company shall not be held liable to any person doing business with said Telegraph Company for any neglect or failure in the transmission or delivery of messages, and said Telegraph Company

shall not be responsible for any error or failure in the transmission or delivery of messages sent free for said Railroad Company under this agreement.

Sixth. Either party to this agreement may establish and maintain such offices on the line of said roads as it shall deem expedient, and when said Telegraph Company elects to establish an office at a station of said Railroad Company, then said Railroad Company, if it has room to do so, shall furnish suitable accommodations in such station free of rent, and if at such station one person can attend to the telegraph business of both parties, the Telegraph Company shall do the telegraph business of the Railroad Company without charge, and the operator at such station shall be subject to the directions of the chief operator of the Railroad Company so far as railroad business is concerned, but whenever the business of any such office becomes so large that more than one operator is needed to do the business of both parties, then said Railroad Company will employ and pay its own operator.

Seventh. One wire shall be set apart for the preferential use of the Railroad Company along the entire length of all its roads, except along branch roads where only one wire is maintained, and on such wires along said branch roads the important business only of the Railroad Company relating to the movement of its trains, accidents and damage to road shall have precedence; otherwise, the business of both parties hereto shall have equal facilities thereon.

28 Eighth. And it is further agreed that if the Railroad Company should at any time require greater wire facilities on any portion of its roads than are herein provided, the Telegraph Company will furnish an additional wire at the cost price thereof upon its poles, or the Railroad Company may at its own cost string said additional wires upon the Telegraph Company's poles.

Ninth. Upon the wires thus set apart for the preferential use of the Railroad Company's business, and also the family

and social messages of its officers and agents may be sent free, but all other business except that which is ordered to be sent free by the Telegraph Company shall be charged for and the proceeds thereof shall be remitted as hereinbefore provided. The Telegraph Company agrees to issue to such officers and agents of the Railroad Company as may be designated by the president or general superintendent thereof, annual franks authorizing the free transmission over any of the lines of the Telegraph Company in the United States of messages relating strictly to the railroad or corporate business of the Railroad Company to or from points beyond or off the line of the railroads covered by this agreement.

Tenth. It is mutually understood and agreed that the telegraph line and wires covered by this contract shall form part of the general system of the Telegraph Company, and as such in the department of commercial or public telegraph business shall be controlled and regulated by it, the Telegraph Company fixing and determining all tariffs for the transmission of messages, and all connections with other lines.

The Railroad Company further agrees that its employes shall transmit all commercial telegraph business offered at its offices over the lines of the Telegraph Company party hereto, and shall account of the Telegraph Company exclusively for all of such business and the receipts thereon as provided herein. No employe of the Railroad Company shall while in its service be employed by any other telegraph company than the Telegraph Company party hereto.

29 Eleventh. Each party hereto hereby releases and discharges the other from all claims and demands of whatever nature arising and accruing previous to the date hereof.

The provisions of this agreement shall supersede all previous agreements between the parties hereto or their predecessors, and shall be and continue in force for and during the term of five (5) years from and after the first (1st) day of July eighteen hundred and eighty (1880) and thereafter until (1) year's notice in writing shall have been given by one of the parties hereto to the other of a desire or intention to terminate the

same; and in case of any disagreement concerning the true intent and meaning of any of said provisions the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto and the third by the two others chosen, and the decision of such arbitrators or a majority thereof shall be final and conclusive.

In witness whereof, the parties to these presents have caused their corporate names by the hands of their respective presidents to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

(Signed) THE LOUISVILLE & NASHVILLE RAILROAD CO.
By H. VICTOR NEWCOMB,
President. [Seal]
THE WESTERN UNION TELEGRAPH CO.
By NORVIN GREEN,
President. [Seal]
A. R. BREWER, Secretary.

We, the undersigned, each for ourselves hereby accept notice of the foregoing agreement executed on the fourteenth day of May, 1880, by and between the Louisville and Nashville Railroad Company acting for itself and as the duly authorized representative of ourselves, of the first part, and the Western Union Telegraph Company, of the second part, and we hereby severally each for ourselves assume the obligations and benefits of the said agreement, and ratify and approve the action of the said Louisville and Nashville Railroad Company in executing the same for us and in our behalf; it being
30 understood and agreed that our individual or several obligations in respect to said agreement shall not be released or impaired by any failure to observe the same on the part of any one or more of the other railroad companies named therein.

In witness whereof, we have caused these presents to be executed in our respective corporate names by the hands of

our respective presidents and secretaries and under our respective corporate seals.

(Signed) THE NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILROAD CO.
(see signature on back of this sheet)
H. ....., President.
....., Secretary.
THE SOUTH & NORTH ALABAMA RAILROAD CO.
By H. VICTOR NEWCOMB,
President. [Seal]
H. M. BUSH, Secretary.
THE MOBILE & MONTGOMERY RAILROAD CO.
By JOSIAH MORN,
President. [Seal]
G. W. CRAIK, Secretary.
THE NEW ORLEANS & MOBILE RAILROAD CO.
By ....., President.
....., Secretary.

In accepting this agreement the Nashville, Chattanooga and St. Louis Railway reserves the right of granting to the Memphis and Charleston Railroad Company the privilege of erecting for its own use a telegraph wire upon the poles of the Nashville, Chattanooga & St. Louis Railway between Stevenson, Ala. and Chattanooga, Tenn.

(Signed) THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.
By JAS. D. PORTER,
President. [Seal]
R. C. BRANIFORD, Secretary.

On Reverse: No. 201. Agreement between the Louisville & Nashville Railroad Company and the Western Union Telegraph Company. Dated May 14th, 1880. This contract must be returned to the Secretary. Contract 201.

CONTRACT NO. 357-1.

Filed June 4th, 1912.

Date L. & N. R. R. Co. and W. U. Tel. Co.

This agreement made and entered into this eighteenth (18th) day of June, 1884, by and between the Louisville and Nashville Railroad Company, hereinafer designated as the Railroad Company, and the Western Union Telegraph Company, hereinafter designated as the Telegraph Company, witnesseth:

Agreement of May 14, 1880.

Whereas, the operation of the Telegraph Company's lines along the various railroads owned, controlled or operated by the Railroad Company, has been conducted under the provisions of an agreement between the parties hereto, dated May 14th, 1880, which agreement provides that it may be terminated on one year's written notice after July 1st, 1885;

New Agreement.

And, whereas, it is desirable that a new agreement should be entered into between the parties hereto,

Now, therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

Railroads Embraced.

First. This contract is intended to cover, and shall embrace, all the railroad lines now owned, leased, controlled or operated by the Railroad Company, which are as follows:

Those absolutely owned by the Railroad Company being:

Owned by L. & N. Cincinnati Division:

Cincinnati Division, extending from Newport, Ky., to Louisville, Ky.

Lexington Branch.

Lexington Branch, extending from LaGrange, Ky., to Lexington, Ky.

Louisville Divison.

Louisville Division, extending from Louisville, Ky., to Nashville, Tenn., with branch from Bardstown Junction, Ky., to Bardstown, Ky.

Knoxville Division.

Knoxville Division, extending from Lebanon Junction, Ky., to the Tennessee State line at Jellico, Ky.

Memphis Line.

Memphis Line, extending from Memphis Junction, near Bowling Green, Ky., to Memphis, Tenn.

Henderson Division.

Henderson Division, extending from Edgefield Junction, Tenn., to Henderson, Ky., with branch from Madisonville, Ky., to Providence, Ky.

Pensacola Division.

Pensacola Division, extending from Pensacola Junction, Ala., to Pensacola, Fla.

32 Pensacola and Selma Division.

Pensacola and Selma (upper and lower) Divisions, extending respectively from Gulf Junction, near Selma, Ala., to Pine Apple, Ala., and from Pensacola Junction, Ala., to Repton, Ala., and

New Orleans and Mobile Division.

New Orleans & Mobile Division, extending from Mobile, Ala., to New Orleans, La.

The lines leased by the Railroad Company being:

Shelby R. R.

Shelby Railroad, extending from Anchorage, Ky., to Shelbyville, Ky.

N. Division C. & O.

Northern Division of Cumberland & Ohio Railroad, extending from Shelbyville, Ky., to Bloomfield, Ky.

S. Division C. & O.

Southern Division of Cumberland & Ohio Railroad, extending from the junction near Lebanon, Ky., to Greensbury, Ky.

S. E. & St. L. Ry.

Southeast & St. Louis Railway, extending from Evansville, Ind., to East St. Louis, Ills., with branches from McLeansboro, Ills., to Shawneetown, Ills., and from O'Fallon Junction, Ills., to O'Fallon, Ills.

N. D. R. R.

Nashville & Decatur Railroad, extending from Nashville, Tenn., to Decatur, Ala.

M. & M. Ry.

Mobile & Montgomery Railway, extending from Mobile, Ala., to Montgomery, Ala., and

Selma Division.

Selma Division of Western Railroad of Alabama, extending from Montgomery, Ala., to Selma, Ala.

Lines Controlled by L. & N. Co.:

The lines controlled by the Railroad Company being:

N. C. & St. L. Ry.

Nashville, Chattanooga & St. Louis Railroad, extending from Chattanooga, Tenn., to Hickman, Ky., and the various branches thereof.

S. & N. Alabama.

South & North Alabama Railroad, extending from Decatur, Ala., to Montgomery, Ala., with a branch from Elmore, Ala., to Wetumpka, Ala.

Ponchartrain R. R.

Ponchartrain Railroad, extending from New Orleans, La., to Lake Ponchartrain, La.

P. & A. R. R.

Pensacola & Atlantic Railroad, extending from Pensacola, Fla., to River Junction, Fla.

O. & N. Ry.

Ownesboro & Nashville Railroad, extending from Owensboro, Ky., to Adairsville, Ky.

N. & F. R. R.

Nashville & Florence Railroad, extending from Columbia, Tenn., to Lawrenceburg, Tenn.

Glasgow R. R.

Glasgow Railroad, extending from Glasgow Junction, Ky., to Glasgow, Ky.

Birmingham Mineral R. R.

Birmingham Mineral Railroad, extending from

Louisville, Harrod's C. & W. R. R.

Louisville, Harrod's Creek & Westport Railroad, extending from Louisville, Ky., to Prospect, Ky.

To Include Branches, Etc., to Be Constructed.

And this contract is also intended to cover, and it shall include, any branch or branches that may be constructed by the Railroad Company or other railroad or railroads that may be acquired by it, either by lease or purchase, or that may be controlled or operated by it during the existence of this agreement, should it be lawfully competent to include it or them.

33

Exclusive Right of Way—Exclusive Right to Maintain Offices in Depots—Railroad Company Not to Transport Men, Etc., for Competitive Company's Except at the Railroad's Tariff Rates—Railroad Company Not to Furnish Assist-

ance to Competing Lines—Protecting and Defending the Exclusive Rights.

Second. The Railroad Company, so far as it legally may, hereby grants and agrees to assure to the Telegraph Company, the exclusive right of way on and along the line, lands and bridges of all roads now owned, leased, controlled or operated by said Railroad Company, or which it may hereafter own, lease, control or operate, for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the Telegraph Company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business, and the Railroad Company will not transport men or material for the construction or operation of any line of poles and wire or wires or other lines in competition with the lines of said Telegraph Company party hereto, except at and for the Railroad Company's regular local tariff rates, nor will it furnish for such competing line or lines and facilities or assistance which it may lawfully withhold nor stop its trains, nor distribute material therefor at other than regular stations.

Provided, always, that in protecting and defending the exclusive grants conveyed by this contract, the Telegraph Company may use and proceed in the corporate name of the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

Railroad to Transport Free Officers and Employes of Telegraph Company and Poles, Wires, Etc., to Points Wanted—Transport Free Materials, Etc., Off Roads Covered by This Agreement to an Amount to Be Computed—Free Telegraph Service—Transportation to Be Furnished Promptly.

Third. The Railroad Company agrees to transport free of charge over any and all of its roads, all officers and employes of the Telegraph Company, when travelling on the business of the said Company, and also to transport

free of charge, and distribute along its said roads at the points required, all poles, wire, insulators, brackets, and all other material of the Telegraph Company, to be used in the construction, reconstruction, maintenance, repair and operation of its telegraph lines and wires on the said roads covered by this agreement, and all supplies and other material for the establishment and maintenance of the offices thereon; and the Railroad Company also agrees to transport free of charge all poles and other material for the use of said Telegraph Company on its lines beyond or off the roads covered by this agreement, to
34 an amount computed at the local freight charges of said Railroad Company, not exceeding one-half (1/2) of the amount of free telegraph service which the Telegraph Company may perform for the Railroad Company beyond the roads covered by this agreement, the tolls for said free telegraph service to be computed at the regular day rates of the Telegraph Company between the points at which the messages of the Railroad Company may originate, and the points to which they may be destined. Settlements to be made at the end of each year.

All of such transportation shall be furnished by the Railroad Company with reasonable promptness, upon application of the superintendent or other officer of the Telegraph Company.

Rairoad Company to Furnish Labor for Maintenance and Ordinary Current Repairs on Roads Named—General Reconstruction Telegraph Company to Supply Labor.

Fourth. The Railroad Company shall furnish on the request of the superintendent or foreman of the Telegraph Company, all the unskilled labor necessary for the maintenance and ordinary current repairs of the Telegraph Company's lines of telegraph on said roads, such repairs to include the necessary renewal of poles, not to exceed an average of one new pole for every mile of road operated by the Railroad Company in any one year until the lines shall require reconstruction; but for general reconstruction and renewal of poles the Telegraph Company

shall supply the labor, the Railroad Company furnishing transportation and distribution of material as aforesaid.

Telegraph Company to Furnish Material and Men for Maintenance and Reconstruction of Its Lines, Railroad Company to Furnish Foreman—Constructing Line of Telegraph—Telegraph Company to Furnish Instruments, Etc., and Stationery—Telegraph Company to Furnish Use of Its Main Batteries.

Fifth. The Telegraph Company agrees to furnish all material and the necessary line repairers for the maintenance, repair and reconstruction of its lines and wires along said railroads, and a competent foreman to direct the labor which the Railroad Company hereinbefore agrees to furnish. The Telegraph Company further agrees to furnish within six months after receipt of written notice from the Railroad Company, all labor and material, and to construct a line of telegraph on any road or branch now or hereafter owned, leased, controlled or operated by the Railroad Company on which there may be no line of telegraph. The Telegraph Company further agrees to furnish instruments and local batteries and materials to maintain said batteries and blank forms and stationery for commercial business for the establishment, maintenance and operation of the telegraph offices on and along said railroads. The Telegraph Company will also furnish the use of its main batteries for the successful operation of its wires along said railroads, including the wires set apart for the use of the Railroad Company.

Railroad Employes Acting as Agents of Telegraph Company to Receive Public Messages at Tariff Rates and Deliver Them—Paying Telegraph Company Receipts From Public Messages—Percentage for Public Message Business. Cable Messages—Transmitting Free Messages—Special Deliveries.

Sixth. At all telegraph stations of the Railroad Company, except at its depots or stations located at terminal points where the Telegraph Company maintains separate

offices, the Railroad Company's employes, acting as agents of the *Telegraph Company, shall* receive, transmit and deliver promptly such commercial or public messages as may be offered at the tariff rates of said Telegraph Company, and shall render to said company monthly statements of such business and full accounts of all receipts therefrom, and the Railroad Company shall pay to said Telegraph Company at such time and in such matter [manner] as it may direct, all of such receipts at said offices, after deducting ten (10) per centum of the cash receipts at said offices on business with points on the Telegraph Company's lines, it being agreed that the Railroad Company may retain said ten (10) per centum as compensation for the services of its employes in the transaction of and accounting for said commercial telegraph business; but the Railroad Company shall not retain any portion of tolls on cable messages or tolls belonging to lines of other companies. The Railroad Company's employes shall not, without the consent of said Telegraph Company, transmit over said telegraph lines any free messages except those herein provided for, and concerning all telegraph business, whether paid or free, shall conform to all rules and regulations of said Telegraph Company applicable thereto. Provided, said railroad employes shall be entitled to make special deliveries at the cost of the addressee at greater distances than one-half of a mile from the offices.

Offices—Agents and Telegraph Operator—Number of Paid and Collect Messages, Telegraph Company to Provide Operator—Business Too Large for One Operator.

Seventh. Either party to this agreement may establish and maintain offices at such places on the line of said roads as it shall deem expedient; and if said Telegraph Company elects to establish an office at a station of said Railroad Company, then the Railroad Company, if it has room to do so, shall furnish suitable accommodations in such station free of rent; and if at any station one person can attend to the telegraph business of both par-
36 ties, the Telegraph Company's operator shall do the telegraph business of the Railroad Company

as its agent and without charge; and said operator at such station shall be subject to the directions of the chief operator of the Railroad Company, so far as railroad business is concerned.

Whenever the number of paid and collect messages, including repeated messages, sent from any railroad office, exceeds four thousand (4,000) in any one year, the Telegraph Company shall provide an operator for such office, and said operator shall, as hereinbefore provided, do the telegraph business of the Railroad Company as its agent and without charge.

Whenever the telegraph business of both parties hereto at any office of the Telegraph Company in a railroad depot becomes so large that more than one operator is needed to do such business of both parties, then the Railroad Company will employ and pay its own operator.

Damages Telegraph People Being Carried Free Railroad Company to Be Held Harmless—Messages for Telegraph Company People—Telegraph Company Not Responsible for Error in Transmission—Railroad Company Not Responsible for Damages From Property of Telegraph Company.

Eighth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company hereby covenants and agrees to save the Railroad Company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free over said roads under this agreement or from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company or on account of any other public telegraph business; and the Telegraph Company shall not be responsible for, and the Railroad Company agrees to indemnify and save harmless the Telegraph Company against any loss or damages of any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the Railroad Company under this agreement. And the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save it harmless and

indemnify it against any loss or damages of any kind, including costs and attorney's fees *incident to or resulting* from any injury to persons growing out of the position or condition of any of the telegraph poles, wires or other property of the Telegraph Company along said
37 railroad lines.

One Wire for Use of Railroad Company—Precedence Message. Greater Wire Facilities—Wire for Railroad Officers Use.

Ninth. One wire shall be set apart for the preferential use of the Railroad Company along the entire length of all the roads, except along branch roads where only one wire is maintained and on such wires along said branch roads the important business only of the Railroad Company relating to the movement of its trains, accidents and damage to road shall have precedence; otherwise, the business of both parties hereto shall have equal facilities thereon. And it is further agreed that if the Railroad Company should at any time require greater wire facilities on any portion of its road than are herein provided, the Telegraph Company will furnish an additional wire at the cost price thereof upon its poles, or the Railroad Company may at its own cost string said additional wire upon the Telegraph Company's poles in such manner and position as it may direct. Upon the wires thus set apart for the preferential use of the Railroad Company, its business messages and the family and social messages of its officers and agents may be sent free between all points on its roads; but all other business except that which is ordered to be sent free by the Telegraph Company shall be charged for and the proceeds thereof shall be remitted as hereinbefore provided.

Telegraph Company to Issue Franks to Railroad Officers for Free Messages.

Tenth. The Telegraph Company agrees to issue to such officers and agents of the Railroad Company, as may be designated by the president, vice president or general manager thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad

or corporate business of the Railroad Company, originating at or destined to all points on the Telegraph Company's lines in the United States, including points on the Railroad Company's railroads. Said franks may be used for the transmission of such messages of the Railroad Company between the principal cities on the line and at the termini of its roads; but it is understood and agreed that the Railroad Company shall, as far as practicable, transmit its business between all places reached by its roads over the wires herein set apart for railroad business.

38 Telegraph Lines Covered by This Contract to Form Part of General System of Telegraph Company. Railroad Company to Transmit Commercial Telegraph to Account to Telegraph Company. Railroad Employes Not to Be Employed by Other Telegraph Companies.

Eleventh. It is mutually understood and agreed, that the telegraph lines and wires covered by this contract shall form part of the general system of the Telegraph Company, and as such, in the department of commercial or public telegraph business, shall be controlled and regulated by it, the Telegraph Company fixing and determining all tariffs for the transmission of messages and all connections with other lines.

The Railroad Company further agrees that its employes shall transmit all commercial telegraph business offered at its offices over the lines of the Telegraph Company party hereto, and shall account to the Telegraph Company exclusively for all such business and the receipts thereon, as provided herein.

No employe of the Railroad Company shall, while in its service, be employed by any other Telegraph Company, that the Telegraph Company party hereto.

This Agreement to Supersede All Other Agreements—Length of Time of This Agreement—One Year's Notice of Termination to Be Given—Differences to Be Referred to Arbitration—This Contract to Cover Any Railroad Lease of Which to L. & N. Co. Shall Have Terminated, Unless This Contract Is Renewed—This Agreement to Be Still

in Force on Roads, Etc., Which the L. & N. Co. May Part With—*Amendments to This* Agreement—Amendments to Be Referred to Arbitration if Not Agreed on. Decision of Arbitrators Upon Amendments—Seals and Names, Etc.—L. & N. R. R. Co., West. U. Tel. Co.

Twelfth. The provisions of this agreement shall supersede said agreement hereinbefore mentioned and all other agreements between the parties hereto or their respective predecessors in ownership or control of their respective properties; and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from and after the first (1st) day of July eighteen hundred and eighty-four (1884), and thereafter until the expiration of one (1) year after written notice shall have been given by one of the parties hereto to the other of a desire or intention to terminate the same; and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen, and the decision of such arbitrators, or of a majority thereof, shall be final and conclusive. Provided, that should the lease or control of any railroad now held by the Railroad Company terminate before the expiration of the twenty-five years hereinbefore specified, this contract shall not cover such railroad after the termination of such lease or control.
39 unless the same should be renewed within the said term of twenty-five years, or unless the owner or lessee of such railroad shall ratify this agreement, and should the Railroad Company cease from any cause to own any railroad or branch herein mentioned, this contract shall continue to apply to such railroad or branch of the Telegraph Company shall so elect, the Railroad Company agreeing that, in case it shall part with the ownership or control of any railroad it will require the purchaser or lessee thereof to accept the obligations and benefits of this agreement, if the Telegraph Company shall elect to continue to apply this agreement to such road.

Provided, however, and it is hereby expressly stipulated and agreed, that if any of the provisions of this agreement shall be found unusually burdensome or oppressive to either party, such party, after having given ninety (90) days' written notice to the other, may propose such amendments or changes to this agreement as it may deem just and equitable and consistent with the general tenor of this agreement. In case the parties hereto shall not be able to agree upon such proposed amendments or changes, the same shall be referred to and settled by arbitrators in the manner hereinbefore provided, it being understood and agreed that the powers of such arbitrators shall not extend to making either wholly or substantially a new contract, but simply to the relief of either party from any provisions complained of, which experience under the agreement shall have proved to be inequitable, and the operation of which may not now be foreseen by the parties hereto. The decision of such arbitrators shall be binding upon the parties hereto and shall thereafter stand as a part of this agreement without further act of the parties unless modified or amended by some future decision of arbitrators as herein provided.

In witness whereof the parties to those presents have caused their corporate names, by the hands of their proper officers, to be hereunto subscribed, and their corporate seals affixed and attested, the day and year first above written.

L. & N. R. R. Co.

(Signed) THE LOUISVILLE & NASHVILLE
40 RAILROAD COMPANY.
By M. H. SMITH,
President. [Seal]
R. K. DANIN,
Asst. Secretary.

West. U. Tel. Co.

THE WESTERN UNION TELEGRAPH COMPANY.
By JNO. VAN HORNE,
Vice President. [Seal]
A. R. BREWER, Secretary.

Acceptance of Contracts by Roads Controlled by L. & N. Co.

We, the undersigned, *each for ourselves, hereby accept* notice of the foregoing agreement executed on the eighteenth (18th) day of June, 1884, by and between the Louisville and Nashville Railroad Company, acting for itself and as the duly authorized representatives of ourselves and the Western Union Telegraph Company, and we hereby severally, each for ourselves, assume the obligations and benefits of the said agreement and ratify and approve the action of said Louisville and Nashville Railroad Company in executing the same for us and in our behalf, it being understood and agreed that our individual or several obligations in respect to said agreement shall not be released or impaired by any failure to observe the same on the part of any one or more of the owners of the railroads therein named. We further agree, each for ourselves, that in case the Louisville and Nashville Railroad Company shall from any cause cease to control or operate our respective railroads, then and in that case all of the terms and conditions of the foregoing contract dated June 18th, 1884, shall be and are hereby adopted and ratified, and are hereby constituted a contract between the Western Union Telegraph Company and each of us, so far as said terms and conditions are applicable to our respective roads, each railroad company hereby contracting for itself with the Western Union Telegraph Company.

In witness whereof we have caused these presents to be executed in our respective corporate names by the hands of our proper officers and under our respective corporate seals.

41 N. C. & St. L. Ry.

(Signed) THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY,

By ....., President. (Seal)

R. E. BRANIFORD, Secretary.

S. & N. Ala. R. R.

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY,

By M. H. SMITH, Vice President. (Seal)

H. M. BUSH, Secretary.

Acceptance by P. & A. R. R. Co.:

The undersigned, the Pensacola and Atlantic Railroad Company, hereby accepts notice of the foregoing agreement executed on the eighteenth (18th) day of June, 1884, by and between the Western Union Telegraph Company and the Louisville and Nashville Railroad Company, acting for itself and as the duly authorized representative of the undersigned, and the undersigned hereby assumes the obligations and benefits of said agreement, and hereby ratifies and approves the action of said Louisville and Nashville Railroad Company in executing the same for and in our behalf, it being understood and agreed that our individual obligations in respect to said agreement shall not be released or impaired by any failure to observe the same on the part of any one or more of the owners of the railroads therein named, and that said agreement shall supersede the agreement dated December 30th, 1881, between the Pensacola and Atlantic Railroad Company and the Western Union Telegraph Company. The undersigned further agrees that in case the Louisville and Nashville Railroad Company shall from any cause cease to control or operate the Pensacola and Atlantic Railroad, then and in that case, the agreement heretofore existing between the Western Union Telegraph Company and the Pensacola and Atlantic Railroad Company, dated December 30th, 1881, shall be revived and shall continue in full force and effect in all respects during the remainder of the term thereof.

In witness whereof we have caused these presents
42 to be executed in our corporate name by the hands of our proper officers and under our corporate seal.

P. & A. R. R. Co.

(Signed) THE PENSACOLA AND ATLANTIC RAILROAD COMPANY.

By M. H. SMITH, President. (Seal)
R. M. CAREY, JR., Secretary.

At a meeting of the board of directors of the Louisville & Nashville Railroad Company, held at the company's office, No. 52 Wall Street, New York, on the 11th day of June, 1884, a quorum being present, the following resolutions were passed:

Resolved, That this company hereby approves the contract herewith submitted between the Louisville and Nashville Railroad Company, The Nashville, Chattanooga and St. Louis Railway, The South and North Alabama Railroad Company, and other railroad corporations owned or controlled by the Louisville and Nashville Railroad Company, and the Western Union Telegraph Company, bearing date the 18th day of June, 1884, to take effect July 1st, 1884, and to continue in force for twenty-five years, abrogating all existing contracts between this company and the other companies above mentioned, and such Telegraph Company.

Resolved, That such contract be executed by the president and secretary, on behalf of this corporation in due form, and that proper execution of the same on the part of the other companies therein mentioned be procured; that the contracts be exchanged, and that the same be entered at length upon the minutes of this company.

A true copy from the minutes.

Attest: (Signed) R. K. WANEN,
(Seal) Ass't. Secty.

43 On reverse: Contract #357-1. Contract. Agreement between the Louisville and Nashville Railroad Company and the Western Union Telegraph Company, dated June 18th, 1884. 357-1. This contract must be returned to the secretary.

44 EXCEPTION OF NO CAUSE OF ACTION.

Filed June 15th, 1912.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville & Nashville R. R. Co.

Now into court, still under protest, comes the Louisville and Nashville Railroad Company, and peremptorily excepts to plaintiff's petitions and for cause of exception says that the said petitions disclose no cause of action.

And exceptor specially assigns as ground for said exception that this Court having ruled that the federal statutes referred to in the petition give no right or cause of action under the federal decisions, exceptor now says that under the decisions of the Supreme Court of Louisiana the Louisiana statutes are insufficient without federal legislation to give the relief sought, especially as to the crossing of defendant's railroad, occurring five times on the plan annexed to the petition; the Louisiana statutes authorizing expropriation right of way along and over waters, but not along and parallel to railroads.

Exceptor says that expropriation is to be sought as a unit and the entire proposed route as planned is thus shown to be illegal on the face of the papers; and the allegations of the petitions cannot be construed to cover the broken and fragmentary series of routes which remains, nor can such series be validly expropriated.

Wherefore exceptor prays that after all proper proceedings this exception may be maintained and plaintiff's suit dismissed.

(Signed) DENEGRE, BLAIR & VICTOR
LEOVY, Attys. for Deft.

45 ORDER OF COURT REVOKING ORDER OF JUNE 4th, 1912.

Extracts From the Minutes of Division "D."

Monday, June 17th, 1912.

Present: Hon. Porter Parker, Judge.

Civil District Court, Division "D."

Western Union Telegraph Co.
vs. No. 100,244.
Louisville and Nashville R. R. Co.

On suggestion of counsel for plaintiff herein, the refusal of the order to remove the above entitled cause to the U. S. Dist. Court is hereby revoked, and it is now ordered that the said cause be removed to the U. S. Dist. Court for the Eastern District of Louisiana.

46 United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
versus No. 14,528
Louisville & Nashville R. R. Co.

Map showing right of way of L. & N. Railroad, also Western Union Telegraph Co., marked Ex. A., referred to in plaintiff's petition and made part thereof. Filed with transcript of removal, June 29, 1912.

Tabulation—"Preferred" Cross Section Paper, 10x10, 1 inch, marked Ex. B, referred to in plaintiff's petition and made part thereof. Filed with transcript of removal, June 29, 1912.

Blue Print giving Detail of Western Union Telegraph Co.'s Pole Line Looking East from New Orleans to Pearl River, marked Ex. C, referred to in plaintiff's petition and made part thereof. Filed with transcript of removal, June 29, 1912.

Note: The above mentioned exhibits are to be transmitted to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, in the originals, with this transcript, in accordance with the stipulation of counsel, copied at page 282 of this transcript.

47 PROCEEDINGS IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

Exception of Defendant.

Filed July 29th, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14528.
Louisville & Nashville Railroad Company.

Now into court, solely for the purpose of these exceptions, and reserving all objections to the proceedings taken on behalf of plaintiff in this Court before defendant's pleadings became due, and reserving the right to ask by proper proceedings that said proceedings be set aside, comes the Louisville and Nashville Railroad Company, made defendant herein, and, excepting to the pleadings served upon this defendant in the Civil District Court in and for the Parish of Orleans, Louisiana (other than the proceedings declared null by order of that Court), for cause of exception says that this Court, sitting as a court of law, has no jurisdiction of so much of such pleadings as relates to the time from the institution of this suit up to and including August 17, 1912, for the reason that on the face of the papers this proceeding, as to said period, is simply a proceeding to enforce an alleged contract right, which relief this Court, sitting as a court of law, is incompetent to give.

And as relating to the period subsequent to August 17, 1912, defendant excepts that this suit was and is premature; and (if above exception be overruled) that the entire suit was and is premature.

And in case the above exceptions should be overruled, defendant excepts that said pleadings are too vague and indefinite for defendant safely or intelligently to prepare its answer or responsive pleadings thereto, or for farther proceedings to be had upon said pleadings, for this, that said pleadings fail to specifically describe the property of defendant over which the right of way is sought, or the improvements thereon, and that

said pleadings further fail to specifically describe the nature or origin of the alleged right which the petitioner claims up to and including August 17, 1912, or whether or not
48 by contract or the terms thereof, or whether based on oral agreement or written documents; and defendant states that it desires, if it shall be alleged that said right is based on written documents, to pray oyer thereof. And that said pleadings are farther too vague and indefinite in this, that they fail to show, so far as concerns the period up to and including August 17, 1912, what rights the petitioner seeks to take or the terms or conditions under which it seeks to take them, or when its rights are to begin; as to the entire suit.

And in case the foregoing exceptions be overruled, defendant excepts that the said pleadings set forth no cause of action; the defendant pleading this exception as to each of said above described described periods separately and as to both taken together, and pleading said exception as to the points where plaintiff's proposed line crosses the line of defendant's railroad, as well as to the entire proposed line.

Wherefore exceptor prays that after proper proceedings these exceptions may be maintained and plaintiff's suit dismissed; and in case these exceptions be overruled that it have leave and time to answer or otherwise plead as it may be advised and for costs and general relief.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attys. for Deft.

I hereby certify that I am of counsel for the Louisville and Nashville Railroad Company, defendant herein and that the foregoing exceptions are, in my opinion, well founded in point of law, and are not interposed for delay.

(Signed) VICTOR LEOVY.

49 HEARING ON EXCEPTIONS AND ORDER OVERRULING SAME.

Extract From the Minutes, May Term, 1912.

New Orleans, Thursday, August 1st, 1912.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

This cause came on this day to be heard upon the exceptions filed by the defendant herein on July 29th, 1912.

Present: Victor Leovy, of Counsel for Exceptor.

Present: Chas. P. Fenner, of Counsel for Plaintiff in suit.

And was argued by counsel for the respective parties.

Whereupon, and on due consideration thereof, it is ordered by the Court that the said exceptions filed by the defendant herein on July 29th, 1912, be, and the same are hereby overruled.

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50 DEFENDANT'S ANSWER.

Filed August 1, 1912.

Civil District Court, Parish of Orleans, Louisiana, Division D.

Western Union Telegraph Company
vs. No. 100,244.
Louisville and Nashville Railroad Company.

Now into court (under protest against refusing its petition for removal and as stated in its exception) comes the Louisville and Nashville Railroad Company, made defendant herein, and for answer to plaintiff's petition denies all and singular the allegations thereof save as may be hereinafter specially admitted. Defendant specially denies all plaintiff's alleged charter and rights, authorities and capacities.

Further answering, said Louisville and Nashville Railroad Company (hereinafter named defendant or respondent) admits and avers that it is the owner of a strip of land and right of way of which the plan annexed to the petition is a correct representation so far as it goes, but said plan is incomplete in that it does not show in detail the various embankments, bridges, trestles, culverts, drains and other works upon which and in clearing its right of way through the swamps the defendants has expended large sums of money; said bridges being over navigable streams in several instances and defendant having been compelled to construct drawbridges over the waters known as Rigolets and Chef Menteur. (Defendant specially denies that plaintiff has any right to expropriate for the proposed route; and especially as to crossing defendant's tracks and going upon its bridges over navigable waters.)

Defendant further says that it is authorized by its charter to operate a railroad over its right of way and for that purpose to construct, maintain and operate its own telegraph wires and other facilities incident thereto; and is also authorized by amendment to its charter to engage in a commercial telegraph business; and that it is a post-road and common carrier engaged in interstate commerce, all as more fully hereinafter set forth.

51 Further answering, this defendant denies that the petitioner is or ever has been authorized under its charter or any amendment thereto or by any law of the State of New York to construct, maintain or operate any telegraph line in the State of Louisiana, or elsewhere; save as hereinafter expressly stated. Defendant says that petitioner was incorporated under the name of New York and Mississippi Valley Printing Company under and by articles of association and incorporation executed January 20, 1854, which articles expressly declare that they are executed to form an incorporated association or company under the act of the Legislature of New York, entitled An Act to Provide for the Incorporation and Regulation of Telegraph Companies, of which copy is hereto annexed and herewith filed, marked New York 1, and made part hereof; which said act was amended by a New York act of April 8, 1851, of which copy is herewith filed, marked New York 2, and made part hereof; and the title of petitioner was changed to its present title by New York act of April 4, 1856, of which copy is herewith filed and made part hereof, marked New York 3.

Now defendant says that petitioner's certificate of incorporation (under petitioner's original name) which was filed with the secretary of state of New York as provided in said act of 1848, provided for a line of telegraph only from Buffalo, New York, to Saint Louis, Missouri; and nowhere provided for any line in Louisiana; that Section 2 of New York act of 1862 (of which act copy is hereto annexed and made part hereof, marked New York 4) provided that any company so incorporated might construct, own, use or maintain any line or lines of electric telegraph not described in its original certificate of incorporation on complying with said act of 1848; but although said act of 1848 had then been amended as aforesaid, petitioner has never complied so far as concerns Louisiana, with said act as so amended, and has never obtained the consent, written or otherwise, of two-thirds of the persons nor of any persons owning capital stock of such company to extend telegraph lines into Louisiana or to construct branch lines in Louisiana or to unite with any telegraph company operating or to operate in Louisiana; and (although petitioner's
52 Louisana lines, which it now seeks to perpetuate, was constructed more than a year prior to the institution of this suit) petitioner has never filed with the secretary of the State of New York any certificate referring to or covering any line of telegraph constructed or to be constructed in the State of Louisiana, as required by Section 2 of said act of 1862; and its year of grace, therefore, had expired long prior to the institution of this suit. Nor has petitioner ever obtained, as to any Louisiana line, actual or projected, the consent of three-fifths of its board of directors or trustees, or the consent of three-fifths of its stockholders present or represented as required by Section 1 of the New York act of 1870, of which copy is hereto annexed and made part hereof, marked New York 5; nor has petitioner ever filed with the secretary of state of New York or elsewhere any certificate referring to any Louisiana line, actual or projected, as required by Section 701 of Consolidated Laws of New York of 1909, of which copy is hereto annexed and made part hereof, marked New York 6.

Defendant avers that the construction of the line of poles and wires as proposed will seriously interfere with and hamper the ordinary use of its property in each of the several above respects, as shown by experience, and while it has hitherto

permitted, by contract, the existence of such line on its right of way, this has been by contract which has proven unsatisfactory; that the provisions, conditions and arrangement of a contract cannot lawfully be put in a judgment or expropriation, even to the extent proposed in the petition herein or to any extent, although the pretended proposition to that effect contained in the petition especially as to a movable right of way shows that the interference would be serious, and, indeed, in time, destructive, and that the interference with defendant's telegraph business and especially with its business along the route it has selected would be destructive from the beginning; all contrary to acts of Congress of June 15, 1866, and July 24, 1866, and Article 1, Section 8, paragraphs 3 and 7 of the Constitution of the United States and the Louisiana act 140 of 1880.

Defendant says that prior to the time of filing the petition herein by it, there had existed divers agreements be-
53 tween the petitioner and the defendant, all of which were, on the 18th day of June, 1884, merged into a new agreement or contract; that in and by the said agreement, it was provided that the petitioner should have the right to erect along the line of the right of way of the defendant, a telegraph line, and in the construction thereof to erect posts, put cross-arms thereon, string wires on the said cross-arms, and do other things necessary for the effective carrying on of a telegraph business. It was further provided that the defendant should have the right to place its wires upon the poles of the said petitioner for the purpose of conducting its railroad business, and should have the use of said wires in connection with the joint use of the operator sending and receiving messages over both the wires of the petition [petitioner] and of the defendant. And defendant avers that under and by virtue of the said arrangement, both the defendant and the petitioner have used the said posts and wires for their respective business, and are now using the the same. Defendant further avers that under the terms of the said contract, it was to remain in force for twenty-five years from the said 18th day of June, 1884, and contained also the following clause, to-wit:

"And thereafter until the expiration of one year after written notice shall have been given by one of the parties to the other of a desire or intention to terminate the same."

Defendant avers that the petitioner has given such notice

under the said contract, to the defendant, that the said contract will terminate on August 17, 1912; that the said contract and notice have been filed with an exception herein and are by reference made a part hereof; and that as in and by said contract will appear, it is not provided that upon the expiration of the said contract the said poles and cross-arms erected under the said contract shall remain the property of the petitioner, and defendant is advised and believes, and avers, that upon said expiration the said property will be the property of the defendant; and that a condemnation by the petitioner under its said petition will result not in the condemnation of a right of way, as alleged to be sought by it, but in the poles and cross-arms and the use of the same, and is not justified or authorized either by the laws of the United States or the laws of the State of Louisiana.

That the defendant, under the contract, aforesaid,
54 has strung its wires for the communication by telegraph of messages necessary in the conduct of its business of running trains and transporting persons and freight, and is now using the same for the said purpose; and that an interference with the use of the said wires and telegraphic communications for the purposes of the defendant as aforesaid, would be an interference with the ordinary travel and use of the railroad of the defendant in the State of Louisiana, and is directly prohibited by the statute of the State of Louisiana under which the petitioner claims the right to have the condemnation sought.

That under the said contract and the provisions thereof the petitioner and the defendant selected the point at which the poles should be placed for the putting thereon of cross-arms and the stringing of wires, for the joint use of the petitioner and the defendant; and that in such selection the defendant chose the best, most convenient, least expensive and most proper place for the erection, maintenance and operation of a telegraph line for its own business, and if the petitioner be allowed to condemn the said location and appropriate the same for its own exclusive use, then the defendant will be deprived, not only of a portion of its right of way, but also of that portion which is best, most convenient, most practicable and least expensive in the construction, maintenance and operation of its own line of telegraph; and defendant is advised and believes that such condemnation cannot be had under or by virtue

of the acts of Congress or by statute of the State of Louisiana; that the petitioner in its petition has located the lands as to be condemned for its purposes the land now occupied by the poles, cross-arms and other instrumentalities of the petitioner; and the said location is one which has been appropriated by the defendant for its telegraph lines, and that the condemnation by the petitioner would interfere with the ordinary travel and use of the railroad of the defendant, and no condemnation can be had of any part of the said right of way under the said petition, since no other location but that now occupied by the said line of telegraph is described or sought in the said petition.

55 The defendant denies that the petitioner has endeavored earnestly and in good faith to procure the consent of the petitioner to the occupation of the spaces now occupied by it for the running of its line of telegraph on and along the rights of way of the lines of the defendant in the State of Louisiana; and alleges that the defendant is willing, and has always been willing, to continue to permit the petitioner to use its lines as they now exist, upon the terms and conditions set forth in the contract between the defendant and the petitioner aforesaid; or upon any reasonable and just terms acceptable to both parties, but that the petitioner does not desire to grant to the defendant reasonable and just terms, but desires to use the process of condemnation which it alleges to exist under the law, for the purpose of coercing the defendant into an unjust inequitable contract.

And defendant avers that not only has it the present right to string its wires upon the poles erected the petitioner under the contract aforesaid, and to use the said wires in its railroad business, but it also avers that it has procured an amendment to its charter of which copy is herewith filed as part hereof by which it is authorized to contract, maintain and operate a telegraph line for the use of the public, and thus to be a common carrier of telegraphic messages, and has filed with the postmaster general of the United States its acceptance of all the "restrictions and obligations of the act of Congress, approved July 24th, 1866, entitled an act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," all of which is shown by copies filed herewith as part hereof; and that in pursuance of the said amendment defend-

ant has caused to be located the lines for the purpose of telegraphic transmission of messages, both relating to its own business and those sent for the public for hire, at the identical place and line now occupied by the poles erected by the petitioner and heretofore and now used jointly by the petitioner and the defendant; and defendant alleges that the said lines of location has been made not only in what it is advised is a due exercise of its legal right, but in the exercise of due prudence, care and proper economic consideration, it being, as aforesaid, the best place upon the said right of way for the construction, maintenance and operation of a telegraph lines;

and defendant is advised and believes, and therefore,
56 avers, that there is no authority under the statutes of the United States, or the statute of the State of Louisiana, for one public telegraph company, being a common carrier of telegraphic tolls, for the public, to condemn the property or the line, or any of the instrumentalities of another telegraph carrier, common carrier of telegraphic messages, and, therefore, that the petitioner has no right to condemn the said location sought for in the said petition.

Defendant avers that it is advised and believes that the petition of the petitioner seeks to condemn a right of way for its poles at each and every point where its poles are now located along the right of way of the defendant; and the defendant avers that if the said condemnation should be had, and the petitioner placed in exclusive appropriation of the said space, it, the defendant, in the carrying on of its business as a railroad for the transportation of telegraphic message, will be compelled to construct, maintain and operate an independent telegraph line, between its station, for the purpose of conveying telegraphic messages necessary in the operation of its trains and otherwise, and it avers, that at various places along the line of its railroad, by virtue of natural and artificial conditions, it would be impossible for defendant to construct its own line on its own right of way, and the result, therefore, of the condemnation as sought for by the petition would be that the petitioner would be allowed to monopolize the right of way of the defendant, and the defendant would be required to construct in considerable part its own line off of its own right of way; and defendant is advised and believes that such a result must necessarily obtain, and that such a result is not legal under the statutes invoked by the petitioner.

And defendant avers that the growing demands of the Interstate Commerce Commission and of the Railroad Commission of the State of Florida, and of the public, are such that in the near future, it is probable that the defendant will be required to make constructions upon its right of way which will be inconsistent with the presence upon said right of way of a telegraph line of the petitioner distinct and independent of the telegraph lines of the defendant necessary for its own uses as a railroad and necessary under the amendment of
57 its charter aforesaid, for the service of the public, for example:

The demands of business, the expediation of passenger trains, the safety of both passenger and freight trains, are demanding of the defendant and other roads similarly situation [situated], that its lines of roads should be double tracked, and the defendant has commenced such double tracking and progressed upon its main line to a considerable extent therein; and will, in all probability, also double track at least a portion of its lines in the State of Louisiana in the near future, and defendant avers that if such double tracking be done, the rights of way of the defendant are not broad enough to accommodate, consistently with safety and with the ordinary use and travel of its railroad, the said double tracks, its side tracks, its own line of telegraph, and in addition thereto, the telegraph lines of the petitioner.

Defendant says that the commissions aforesaid, and public sentiment, and the safety of persons transported upon the lines of road of the various railroads throughout the United States, including the defendant, are insistent that there shall be established a system of block signals, or other equivalent safety devices for the operation of trains. The defendant is now experimenting with the establishment of such a system, upon one portion of its line, and it may be incumbent upon it to establish such system upon all portions of its line.

The establishment of such a system would require the construction thereof upon one side of the tracks of the defendant, and all of the side upon which it was so constructed would be necessary for the use of the said system, so that it would be impracticable to place the telegraph lines of the petitioner upon said side, and would relegate to the other side not only the side tracks of the defendant, but also the telegraph lines of

the defendant used in its railroad business and for the public, and if it were practicable, the lines of the petitioner.

That the construction of the lines as sought for by the petitioner would interfere with the ordinary travel and use of the railroad lines of the defendant.

Defendant denies that there is any necessity for proposed expropriation and says that plaintiff can and does telegraph over telephone lines between the same places, by virtue of contract and community or identity of interests.

58 Respondent further specially pleads that the quantity of land sought to be occupied or used by the plaintiff exceeds that which is reasonably necessary for the purpose intended by the company, in the opinion of respondent and in fact within the meaning of the laws relative to forced taking of property, and in case its objections and exceptions herein shall be overruled and the jury herein allowed to determine the value of the land to be expropriated, respondent desires that the jury shall determine also the extent of the land over which the plaintiff may exercise the forced expropriation; always subject to the decision of the Supreme Court on appeal.

Respondent says in support of said plea that the length of the cross-arms on the exhibits annexed to plaintiff's petition, showing the cross-arms it proposes to use is excessive and that by diminishing the length of such cross-arms one-third as could be reasonably and practicably done, the width of the right of way expropriated by the plaintiff could be substantially reduced and its value and damages to respondent also substantially deduced, and that if such cross-arms so reduced proved incapable of sustaining the wires necessary for the business of the plaintiff. additional lower or higher cross-arms could be used of the same diminished length. Respondent says in this connection that the cross-arms, as at present existing. carry wires upon which are carried the business necessary for the carrying on of respondent's railroad, which business will be eliminated, and that the commercial business to be done by the plaintiff, and which can reasonably be anticipated, will be very greatly reduced by the commercial telegraph to be operated by respondent. even if the line for such telegraph should be illegally forced from the location that has been chosen for it, as above set forth. Defendant further says in support of said plea that the plan proposed by plaintiff proposes more

poles by one-third thereof than would be reasonably necessary within the meaning of said laws.

Defendant says that the proposed expropriation would be useless, as the poles would be in the midst of defendant's right of way, and plaintiff could not legally or practicably have access to the same or consent to same with this status.

59 Defendant says that in many places its right of way is taken up by trestles, etc., and the only available place for location of poles and wires is that where the wires are now strung; especially because of the encroachment of waters on or near the right of way at many points and because the location referred to has more solid ground and is more free from obstruction by ditches and otherwise.

In the light of these and other reasons to be shown at the hearing this respondent submits that besides its absolute right to have the first choice in the selection of a portion of its own right of way for the location of its own poles, wires and telegraph system, certainly the location is not only reasonable, but in many places essential.

Respondent Railroad Company further states to the Court that the main reason that could inspire the petitioner to select as a location the one described (although indefinitely as to metes and bounds) in the petition is a reason of economy, based upon the identical reasons that prompted the respondent to select it. Between the owner of the property in need, and the petitioner, certainly the owner should have the first consideration by the Court.

Respondent says that its right of way (exclusive of bridges), about thirty-five miles long, of which the use is proposed to be taken by plaintiff, which, including supports, would be 25 feet wide, was acquired, cleared and drained and put in order at a very heavy expense; that the swamp through which it passes was at the original time or [of] construction heavily wooded in parts and in many parts passed over deep marshes in the nature of quick-sand, requiring unusually heavy expenses in filling and otherwise in order to bring the whole into shape and keep it in shape for use; that the land over which the right of way is constructed, and which belongs to petitioner, is in part in the inhabited portion of the city and of considerable value, and that taking into consideration the value of the land and the space necessary for supports or braces to poles and

the rights of petitioner thereon and the expense of putting the same in shape and keeping in shape for use; the value of the use thereof (exclusive of bridges) proposed to be taken by plaintiff is not less than twenty thousand ($20,000) dollars.

Respondent further says that its bridges, which the petitioner proposes to utilize, were constructed and are
60 maintained over deep streams and in a country subject to storms and overflows, requiring very substantial and expensive construction; long posts and other expensive items; that the total cost of said bridges exceeded four hundred thousand ($400,000) dollars; and that the value of the use which petitioner proposes to make of the same is not less than forty thousand ($40,000) dollars.

Respondent further shows that if the plan proposed by petitioner is carried out, defendant will be damaged in the respects heretofore and hereinafter shown in the operation of its railroad and telegraph system, and that it will be damaged especially by restricting respondent in its operation of its railroad and of its telegraph line for its trains and for the general conduct of its business for itself and commercial, and it will be obstructed in the construction and use of passing tracks and other side tracks necessary for its business and depots and other buildings and sites therefor, and in the construction of double tracks and in the repair and reconstruction of its bridges and buildings and in the maintenance and operation of its property generally.

These damages and obstructions will be brought about by the presence of the petitioner's poles and wires in the places needed for the location of defendant's railroad and telegraph structures and facilities and by the falling of petitioner's poles and wires and by the danger of fire and obstruction from crews employed by plaintiff working on the right of way and on bridges, increasing the respondent's danger and responsibility and by increased labor rendered necessary in clearing and maintaining the right of way and its property
61 generally; and by interference with the view of engineers; and by interference with the construction and operation of the necessary railroad signal and prospective block systems.

Respondent especially shows that owing to the mode of construction necessarily employed in making its right of way and the character of the country through which it passes and the

presence of a borrow-pit or canal running along the side of the track, the solid ground available for telegraph or railroad purposes is exceedingly limited, and this fact greatly increases the value of the right sought by the petitioner and the damages that will result from the expropriation thereof.

That, as previously stated, defendant's expensive bridges are situated in localities where they are greatly exposed to violent storms which have occasionally brought about the reconstruction of all or a part thereof; that in each of the cases where destruction has taken place the wind's pressure against said bridges has been substantially increased by the presence of telegraph wires thereon; that in many of said instances said bridges, or parts thereof, that were destroyed resisted destruction for a long time and it is reasonable to suppose that in many cases, without this additional pressure, they would not have successfully resisted storms and the destruction thereof would not have resulted.

Defendant accordingly says that it estimates the damages recoverable, according to law, in addition to the value of the rights proposed to be taken at not less than the sum of ten thousand ($10,000) dollars.

Respondent says that it is not willing to accept less than said values and damages from the petitioner, and that in case the respondent can legally be forced to transfer to plaintiff the rights sought to be taken by plaintiff (all of which respondent denies), respondent is unwilling to do so for less than the amounts above stated.

Wherefore respondent prays (always under protest as stated in its petition for removal and subsequent exceptions and protesting against the overruling of the same) that judgment be rendered in its favor and against plaintiff, finally dismissing plaintiff's suit; and in the event that a judgment be
62 rendered in favor of plaintiff, defendant (under protest and reserving the right to insist upon its petition for removal and all its exceptions and objections and have them determined by all and any proper Court) prays that the amount to be paid by plaintiff be fixed at the sum of seventy thousand ($70,000) dollars.

And further (still under protest) prays for costs and general relief.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attys. for Deft.

63 CASE CALLED, JURY IMPANELED, HEARING AND CONTINUANCE.

Extract From the Minutes, May Term, 1912.

New Orleans, Thursday, August 1st, 1912.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

This cause was this day called for trial.

Present: Chas. P. Fenner, of Counsel for Plaintiff.
Present: Victor Leovy, of Counsel for Defendant.

Whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. Geo. Scheuermann,
2. Emile Welty,
3. Wm. B. Bear,
4. Leopold Levy,
5. Jacob Nienaber,
6. L. E. Rabouin,
7. Chas. H. Gans,
8. Fred J. Orfila,
9. W. J. Brodie,
10. Gus. T. V. Sehrt,
11. Paul Rousset,
12. Louis Sporl.

And the trial was proceeded with.

After hearing the pleadings, evidence and testimony in part, it was ordered by the Court that this cause be continued until to-morrow at 9:30 o'clock A. M. for further hearing—and the jurors impaneled in the cause were cautioned not to converse with anyone or among themselves touching the matters in controversy.

64 CASE RESUMED, FURTHER HEARING AND VERDICT ASSESSING PROPERTY AT $6,000.

Extract From the Minutes, May Term, 1912.

New Orleans, Friday, August 2nd, 1912.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

This cause, as continued from yesterday, was this day resumed, counsel for the respective parties as well as the jurors impaneled in the case, to-wit, Geo. Scheuermann, Emile Welty, Wm. B. Bear, Leopold Levy, Jacob Nienaber, L. E. Rabouin, Chas. H. Gans, Fred. J. Orfila, W. J. Brodie, Gus. T. V. Sehrt, Paul Rousset and Louis Sporl, being all present, and the trial was proceeded with.

After hearing further evidence and testimony, and at the conclusion of all the testimony heard on behalf of the plaintiff and defendant, counsel for the defendant moved the Court to direct a verdict in favor of said defendant.

After hearing arguments of counsel for the respective parties on the motion to direct a verdict in favor of the defendant, and on due consideration thereof, the Court overruled the motion, counsel for the defendant reserving a bill of exception to the ruling of the Court.

And the trial was proceeded with.

Whereupon, after hearing arguments of counsel for the parties, respectively, and receiving a charge from the Court, the jury retired to their room to deliberate as to their verdict. After due deliberation, the said jury returned into court, and then and there, in open court, in presence of counsel for the respective parties, did, through their foreman, Chas. H. Gans, render and deliver the following verdict:

65 We of the jury find for the plaintiff in accord-

ance with the prayer of its petition and assess the damages at the sum of six thousand dollars ($6000.00).

New Orleans, Aug. 2nd, 1912.

CHAS. H. GANS, Foreman.

Thereupon, on motion of counsel for plaintiff, it was ordered that said verdict be recorded, and it is done accordingly; and it was further ordered that the said jury be discharged from further consideration of the cause.

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66 TESTIMONY.

Filed November 23rd, 1912.

United States District Court, Eastern District of Louisiana.

Western Union Telegraph Company
vs. No. ....
Louisville & Nashville R. R. Co.

Testimony taken in the above entitled and numbered cause before Judge Foster and a jury on August 1st and 2nd, 1912.

Appearances: Howe, Fenner, Spencer & Cocke; Mr. Fenner for the Plaintiff. Denegre & Blair; Mr. Leovy for the Defendant.

67 Aug. 1, 1912.

Mr. Leovy:

Counsel for the defendant objects to the proceedings at this time, on the ground that the motion fixing this case was made prior to the expiration of the time allowed defendant to plead answer or demur, during which time counsel claims—

The Court:

I will overrule the objection.

Mr. Leovy:

I will reserve a bill of exception.

(Argument of exceptions filed by Mr. Leovy.)

Mr. Leovy:

Counsel for the defendant, after the overruling of the exceptions filed herein, objected to going to trial before the present panel, on the ground that out of a panel of 24 drawn there were only eighteen present, and of the remaining six none were legally served, and of one it is reported that he could not be found at all. Counsel claims the right to have had 24 men notified, according to the statute, and properly served, so that process could be issued in order to bring them here. The defendant denies that the person not found, Albert Konede, was not a qualified juror.

Offer:

Mr. Fenner:

Counsel for plaintiff offers in evidence duly certified copies of the laws of the State of New York, under which the plaintiff, the Western Union Teegraph Company, is incorporated, to-wit: An Act of the Legislature of the State of New York, passed on April 12, 1844; an Act passed April 8, 1851; an act passed June 29, 1853; an Act passed April 19, 1855; an Act passed May 2, 1870; an Act passed April 22, 1862.

Objection:

Counsel for defendant objects to the offer on the ground that the acts referred to have not been sufficiently
68 described or alleged in the petition.

Mr. Fenner:

We allege we are duly incorporated under the laws of the State of New York.

The Court:

I will overrule the objection.

Mr. Leovy:

I will reserve a bill of exception.

Offer:

Mr. Fenner:

I next offer in evidence a duly certified copy of the articles of association and incorporation of the plaintiff corporation under its original name, "The New York & Mississippi Valley Printing Telegraph Company, together with a certificate of the Secretary of State of New York attached thereto, showing the recordation of these articles of association with the Secretary of State of New York. All of the foregoing documents are pinned together as one document, which are marked for identification, "Plaintiff One."

I next offer in evidence a copy of the certificate of incorporation and the articles of association of the plaintiff corporation, the Western Union Telegraph Company, under its original name, "The New York & Mississippi Valley Printing Telegraph Company," certified by the Clerk of the Supreme Court of the County of Monroe, State of New York, as being duly recorded in that county, this document being marked for identification Plaintiff Two (2).

I next offer in evidence a certified copy of a resolution of the plaintiff corporation under its original name, "The New York & Mississippi Valley Printing Telegraph Company,"
accepting the benefits of an act to amend an act,
69 entitled "An Act to provide for the incorporation
and organization of telegraph companies," this document being duly certified by the Clerk of the Supreme and County Courts for the County of Erie, State of New York, to be of record in his office, the same being marked for identification Plaintiff Three (3).

I next offer in evidence a copy, duly certified by the Postmaster General of the United States, of a resolution of the plaintiff corporation, the Western Union Telegraph Company, accepting the provisions of an Act of Congress, entitled "An Act to promote the construction of telegraph lines and the securing to the Government the use of same for military and other purposes, approved June —, 1866, said document and certificate being marked for identification Plaintiff Four (4).

I offer in evidence a certificate from the Secretary of State of the State of Louisiana, showing compliance by the plaintiff, the Western Union Telegraph Company, with the laws of this State with regard to the appointment of an agent in this State for the service of process, said document being marked for identification Plaintiff Five (5).

I offer a similar certificate from the Secretary of State of Louisiana, showing the appointment by the defendant, the Louisville & Nashville Railroad Company, of an agent for service of process in this State, and the designation of the City of New Orleans as a domicile in this State, the same being marked Plaintiff Six (6).

I offer in evidence a carbon copy of a letter, dated March 16, 1912, addressed to the Louisville & Nashville Railroad Company, which, it is admitted, is a true and correct copy of the original letter, addressed on that date by Howe, Fenner, Spencer & Cocke, attorneys for the Western Union Telegraph Company, to the Louisville & Nashville Railroad
70 Company, and duly received by that company, the same being marked Plaintiff Seven (7).

It is further admitted by counsel for the defendant that no reply was made to the letter of March 16, 1912, in question.

G. B. STRAUGHN, a witness examined on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. Give your name, please, and residence.

A. G. B. Straughn; I live in New Orleans.

Q. Where do you reside?

A. In New Orleans.

Q. What connection have you with the plaintiff corporation, the Western Union Telegraph Company?

A. I am district foreman for Louisiana.

Q. What is the nature of the duties you are called upon to perform as district foreman of the plaintiff corporation?

A. Supervising the construction and maintenance of the outside plant.

Q. The supervision of construction and maintenance of the outside plant—that means the poles and wires?

A. Yes, sir.

Q. How long have you been connected with the Western Union Telegraph Company?

A. About a year and a half.

Q. What was your occupation prior to that?

A. I was with the Postal Telegraph Company before that time.

Q. In the same general capacity?

A. Practically.

71 Q. How long have you been engaged in that general work all together?

A. About thirteen years.

Q. Are you familiar, Mr. Straughn, with that portion of the line of the Western Union that runs over the right of way of the Louisville & Nashville Railroad from the City of New Orleans to the middle of Pearl River, the boundary line of the State of Mississippi?

A. I am.

Q. You have been over that line frequently?

A. Yes, sir.

Q. I show you a map and blue print which was filed with the petition in this case, marked Exhibit A, and I ask you whether that map correctly represents the right of way generally of the Louisville and Nashville Railroad between New Orleans and the middle of Pearl River and the telegraph line of the plaintiff corporation, the Western Union Telegraph Company, along it?

A. Well, now, I don't quite understand that question.

Q. I say does that generally represent—

A. Yes, sir; generally.

Q. That is generally a very good drawing of the right of way? That represents the track, I suppose, the dotted lines. The dotted line represents the track and the solid line represents the pole line of the Western Union?

A. Yes, sir.

Q. What is the distance, Mr. Straughn, along the right of way of the Louisville & Nashville from New Orleans to the middle of Pearl River?

A. Little over thirty-six miles.

72 Mr. Fenner:

In that connection I offer in evidence these maps, marked Exhibit A.

Q. Would you please look at the document which was filed with the petition in this case, marked Exhibit B, and state what that represents?

A. Beginning there and connecting these strips as they are numbered there, these small dots represent the pole line and this would represent the railroad track, this heavy line.

Q. What is that generally?

A. It is a profile, isn't it?

Q. Showing the location of what? That shows the location of every pole in relation to the track?

A. Yes, sir.

Q. And the heavy line, longitutidinal line, on that document, which you call a profile, represents the track of the defendant corporation?

A. Yes, sir.

Q. And the dots which appear along these heavy longitutinal lines represent each one of the poles of the Western Union Telegraph Company?

A. Yes, sir.

Q. And the figures annexed to each one of these dots represents the distance of the pole in question from the center of the track, does it not?

A. Yes, sir.

Mr. Fenner:

In connection with the witness' testimony, I offer in evidence this document, marked Exhibit B, annexed to the plaintiff's petition.

Q. Now, Mr. Straughn, look at this exhibit, which is marked Exhibit C, and which was filed with the plaintiff's petition and state what that is.

73 A. That is simply a pole diagram of the route, showing how the poles attached to the bridges are attached. This represents a topical line and there are pole attachments.

Q. The diagram on the right represents the topical pole line and cross-arms, whereas the diagram on the left shows how these poles and cross-arms which are on the bridges are attached to the bridges?

A. Yes, sir.

Q. Will you just explain briefly in reference to that diagram how these poles and cross-arms are so attached to the bridges, and why particularly in the case of the cross-arms,

they seem to be on one side of the pole and not in the middle as ordinarily.

A. They are set on the side of the pole like that. That represents the rail of the track, and they are set on the side of the pole in order to clear the track. That is called a side arm.

Q. In other words, the cross-arms of the poles on the bridges are arranged so as to extend beyond the bridge and not towards the track?

A. That's it.

Q. Explain briefly how they are fastened to the bridge.

A. This is called the cap of the piling and the pole is set on the cap at the end. From the center of the pole to the center of the track is eleven feet. And it is attached to the bridge by an iron ankle ring or clamp.

Mr. Fenner:

In connection with the witness' testimony, I offer this document in evidence, Exhibit C.

74 By a juror:

Could he say what is the number of poles?

Mr. Fenner:

I am going to bring all that out.

By Mr. Fenner:

Q. Now, Mr. Straughn, will you state, either by reference to these maps if necessary, or otherwise, how many poles there are on that right of way between the City of New Orleans and the middle of Pearl River?

A. I couldn't tell from a long distance without seeing. I would have to refer to that—there are about 2100.

Q. About 2100 all together?

A. Yes, sir.

Q. And the distance is about thirty-seven miles?

A. Yes, sir; a little over thirty-seven miles; I mean to say a little over thirty-six miles.

Q. That would be about fifty-eight poles to the mile. About how far apart, Mr. Straughn, are these poles on the average?

A. About ninety feet apart.

Q. Now, can you, by referring to that map, tell me about what the average distance these poles are from the center of the track?

A. Do you want this in sections or as a whole?

Q. Both.

A. They are about thirty feet from the track.

Q. That is as a whole?

A. Yes, sir.

Q. That is to say, the average distance of the pole from the center of the track is about thirty feet?

A. Yes, sir.

Q. Now give it in sections.

A. Well, from Pontchartrain Depot to Gentilly
75 it is 46.57 feet; from Gentilly to Michou, 29.50; from Michou to the Chef, 32 feet; from the Chef to Lake Catherine, 32.13 feet; from Lake Catherine to Rigolets, 33.13; from Rigolets to Dunbar, 28 feet; from Dunbar to Pearl River, 32.25.

Q. Is the pole line shown on this exhibit offered in evidence here a properly constructed pole line in accordance with the approved usages in regard to the construction and operation of telegraph pole lines?

A. Yes, sir.

Q. Are the poles the proper distance apart, taking into consideration the general situation?

A. Yes, sir.

Q. Are they a proper distance from the track?

A. Yes, sir.

Q. I will ask you to state whether or not the location of that pole line on that right of way, as indicated in these maps, interferes, or would interfere, in any way with the operation of the Louisville & Nashville Railroad Company?

A. It will not.

Q. Do you know how long that pole line has been there in substantially the same location?

A. I do not.

Q. You know for many years?

A. Yes, sir; I know that.

Q. So far as you could see, you say the pole line located as shown on these maps, would not interfere in any way with the operation of the railroad?

A. It will not.

Q. Now, Mr. Straughn, what proportion of these poles is situated on what I believe is known as the railroad dump, a large or small proportion?

A. A very small proportion.

76 Q. The fact is, is it not, that a great majority of these poles are situated entirely off the so-called railroad dump?

A. Yes, sir.

Q. Please explain what you understand by the term "dump" in that connection.

A. That is the fill, the elevation throwed up to construct the track on.

By a juror:

Q. The roadbed?

A. Yes, sir.

By Mr. Fenner:

Q. The great majority of these poles, then, are situated off the roadbed entirely?

A. Yes, sir.

Q. Where no work has been done by the Louisville & Nashville at all?

A. That's it.

Q. In other words, where the great majority of these poles are located the soil is just exactly in its natural state?

A. That's it.

Q. What is the general topography of that country between New Orleans and Pearl River along that right of way—is it timber land?

A. No, sir; it is marsh.

Q. Is it practically all marsh?

A. Yes, sir.

Q. Suppose the Western Union did not have any line of telegraph there at all now, and eliminating for the moment now that portion of the line which crosses the bridges of the defendant company, what would be the cost to the Western Union under these circumstances to prepare, if any

77 preparation were necessary, to prepare the portion of the ground in which these poles are located for the reception of the poles? Would there have been any preparation necessary at all?

A. You mean clearing a right of way?

Q. Yes.

A. No, sir; no expense at all.

Q. With regard to maintenance, I don't refer to maintenance of the poles and wires, but maintenance of the ground in which these poles are placed, would there be, or is there, any expense for maintenance involved over that right of way from New Orleans to Pearl River?

A. There is not. That grass doesn't grow high, there is nothing to bother anything.

Q. In other words, there is no clearing up to be done along there?

A. No.

Q. If I understand correctly, if there was no telegraph line there at all, and the Western Union proposed to build a line there, it would cost them no less to build a line by reason of the fact that they were building on the right of way of the railroad company, would it?

A. So far as the right of way is concerned, it would not.

Q. In other words, there has been no preparation in the way of clearing done by the railroad company in regard to that portion of the right of way over which these poles run which would otherwise have to be done by the Western Union?

A. Not on construction of the line.

Q. What bridges of the defendant company does that pole line cross between New Orleans and Pearl River?

A. You mean what bridges the line is attached to?

Q. Yes.

A. They are attached to the Rigolets bridge and
78 the Blind Rigolets bridge.

Q. How many poles are there over the Little Rigolets bridge?

A. Three, I believe.

Q. And, as I understand it, over the Big Rigolets bridge there are thirty-four?

A. Yes, sir.

Q. Is there any other bridge to which the pole line is attached on the right of way of the Louisville & Nashville between New Orleans and Pearl River?

A. I don't think so, I never saw any.

Q. This portion of the country between New Orleans and

Pearl River over which the Louisville & Nashville runs you say is all marsh?

A. That's it.

Q. It is not inhabited except for fishing shacks and that sort of thing.

A. No, sir; that is after you leave New Orleans.

Q. What about the cross-arms on these poles, how many cross-arms are there on each pole?

A. Three.

Q. And what is the length of these cross-arms?

A. Ten feet.

Q. With the exception of the cross-arms on the poles on the bridges, are these cross-arms attached to the poles in the middle, so that there is five feet on each side?

A. Yes, sir.

Q. Did I ask you what the height of these poles is?

A. Thirty feet—you didn't ask me but they are thirty feet high.

Q. Does that mean—

A. That is the topical line.

Q. Does that mean thirty feet from the ground,
79 or thirty feet the whole length of the pole?

A. The whole length of the pole.

Q. How much is there in the ground?

A. Five and a half to six feet.

Q. I suppose you don't mean—is every pole there thirty feet or some longer?

A. Some are longer.

Q. Why are some longer?

A. In crossing over the road or crossing over buildings or side tracks and crossing the main line.

Q. In other words, wherever the necessity of the situation demands it the poles are higher?

A. Yes, sir.

Mr. Leovy:

I object to that. It was leading.

Mr. Fenner:

Perhaps it was leading.

Q. Well, I will ask you this, Mr. Straughn. Are these poles as shown on these maps and diagrams which have been

offered in evidence here sufficiently high to meet in all cases with the approved practice as applied to telegraph lines?

A. They are.

Q. Will you look at that map, and I call your attention particularly to the cases of three, I believe, in number in which the pole line of the Western Union crosses the track of the defendant company, and I want you to explain why these crossings are made. In the beginning, Mr. Straughn, at the commencement of the right of way of the Louisville and Nashville proper, at the corner of Elysian Fields and Tonti Street, which I will mark on the map offered in evidence, marked
80 Exhibit A, by a pencil mark, and the letters L. & N., please point out the first place at which the pole line of the Western Union Telegraph Company is presently located and as proposed in the plaintiff's petition to be located under judgment of expropriation in this suit, crosses the track of the Louisville & Nashville Railroad.

A. It crosses just north of the Northeastern crossing at the south end of the Gentilly yards.

Q. Will you explain why, in the location of the pole line, that crossing was made at that point?

A. I don't really know why the crossing was made, but I judge from the tracks there and buildings there that it was moved over there to clear a right of way for a switch yard.

Q. Whatever may have been the original intention the conditions were such as to make it proper that it should cross there?

A. Yes, sir.

Q. Why?

A. Because there is a switching yard on the other side.

Q. And the continuing of the pole line on that same side would have inconvenienced the switching arrangement?

A. Yes, sir.

Q. What is the next point at which the pole line crosses?

A. At the north end of that yard.

Q. It then crosses back to the original side?

A. Yes, sir.

Q. Was that crossing made for some reason?

A. I don't really know. I suppose though they wanted it to continue on one side generally.

Q. Was it proper for it to have been made for that reason?

A. Yes, sir.

Q. Does it cross at any other point?
A. No, sir; except on the Rigolets bridge.
Q. Where, in going over the bridge, it crosses to
81 the opposite side?
A. Yes, sir.
Q. Do you know why that crossing was made?
A. I couldn't tell you.
Q. That's at the Rigolets bridge?
A. Yes, sir.
Q. You say the other two crossings were proper in view of this switch way?
A. Apparently so; yes, sir.

By a juror:
Q. What is the cost of these poles?

By Mr. Fenner:
Q. What is the cost of putting up that pole line, how much per pole, can you give us any idea of that?
A. That would be hard to get at because they were constructed quite a little while ago.
Q. Would the cost be $750.00 a mile?
A. The poles and labor—yes, sir.

By a juror:
Q. What is the cost of a pole by itself?
A. To put up a thirty-foot pole would cost about five dollars, maybe less maybe more.
Q. The expense of putting in the pole would be how much?
A. About five dollars.

By Mr. Fenner:
Q. Would the cost be ten dollars just to buy them and put them in place?
A. Just the pole.

Cross-Examination.

By Mr. Leovy:
Q. What is your position?
A. District foreman.

Q. What do you do, what class of work?

82 A. I supervise the construction and maintenance of the lines in my district.

Q. Do you go out along the route?

A. Yes, sir.

Q. What did you say was the width of the arms of the telegraph line?

A. You mean the length of it?

Q. Yes.

A. Ten feet.

Q. On each side of the pole?

A. No, sir; ten feet in all.

Q. How many of these arms are on a pole?

A. Three.

Q. How are these poles supported?

A. Some of them are braced by means of another pole and some are guyed to an anchor with a storm string.

Q. Are they guyed on both sides?

A. Some both, some on one side.

Q. How many are guyed on both sides?

A. I couldn't tell you.

Q. About?

A. I couldn't tell you that.

Q. As a matter of fact most of them are?

A. Quite a number of them are.

Q. You claim it is necessary to have that privilege for the support of these poles?

A. In that marsh I think it would be.

Q. That plan doesn't show any guys at all does it?

A. What plan?

Q. That plan you looked at this morning.

A. I don't think so.

Q. How far out from the base of the pole are

83 these guys anchored?

A. That depends on circumstances; some are ten feet, some less.

Q. Could you undertake to state now how much land on each side of the pole you require for the purpose of guying.

A. Do you mean how man [many] feet from the pole?

Q. Yes.

A. Well, that would be a hard question to answer under

the circumstances without covering the ground for that purpose.

Q. I am trying to find out how much land you people want. You can't tell us?

A. Well, you know we don't guy every pole in every case of that kind.

A. I don't know anything about it. I want to find out from you how much land you want.

A. Well, it is customary to set these guys, if that's what you want to know, about two-thirds of the distance of the height of the pole above the ground from the pole.

Q. That would be something under twenty feet?

A. Under that; yes.

Q. How deep are these poles sunk in the ground?

A. Five and a half to six feet.

Q. And they are thirty-foot poles?

A. Yes, sir.

Q. Two-thirds of the distance would be sixteen feet on each side of the pole?

A. That or less.

Q. Well, it would have to be one or the other. When you put a guy on you would have to put it in a fixed position?

A. It is customary to put it at about what I said, but it can be set less. The present anchors are about ten feet from the poles as an average.

Q. According to your statement—is a width of
84 sixteen feet necessary in order to guy these poles?

A. Well, yes.

Q. Of course these guys are anchored to the ground and can't be anchored in the center of the railroad track?

A. No, sir.

Q. Now, I want you to look at this map. As I understand it, the point at which the expropriation is proposed to be begun commences at this lead pencil mark—on what street is that in the city of New Orleans?

A. This is supposed to be Elysian Fields right there.

Q. Do you know about what street that is, the lead pencil point?

A. Tonti, I think.

Q. This curved line runs out from Tonti to where, about how many miles is it?

A. Well, that is about a mile and a half or a mile and three-quarters, pretty close to two miles.

Q. A mile and three-quarters shall we say?

A. The scale will show.

Q. What sort of country is that, that mile and three-quarters or two miles, is it inhabited?

A. Not very much along the railroad.

Q. Do you know about the average width of the railroad track between the rails?

A. You mean the gauge of the track?

Q. Yes.

A. A little over four feet.

Q. Do you know the average length of a cross-tie?

A. I judge them to be about six and a half or seven feet long. I don't know that I ever really measured one.

Q. Do you know from your observation about how many railroad tracks crosswise could be put in this space thirty-two feet wide and two miles long?

85 A. I don't quite understand that.

Q. How many railroad tracks could you lay there side by side, taking it as thirty-two feet wide, that is allowing for the guy on either side?

A. I don't know. I don't have any idea how far apart tracks have to be; that's out of my line.

Q. You could put three or four in thirty-two feet?

A. I don't know; you might but they would be pretty close together.

Q. Then, so far as that two miles in concerned, what you people are asking is the practical control, so far as putting tracks is concerned, of a space about thirty-two feet wide and two miles long in an inhabited part of the city?

A. I won't say that.

Q. Now, after that turn, after you pass that turn, what is the character of the country there for about the next two miles? Is it swamp or marsh or inhabited?

A. Outside of the right of way right along there, that's inhabited, outside of the right of way.

Q. Gentilly Road runs along there?

A. Yes, sir.

Q. And there are farms along there?

A. Yes, sir; buildings and things of that kind; I don't know about farms.

Q. There are trees and orchards?

A. Maybe so. I was never out there.

Q. Isn't Mr. Tebo's place, for instance, out in that vicinity?

A. I don't know.

Q. You don't know the names of the people out there?

A. No.

Q. Then, taking the next stretch, after you pass the yards, doesn't a part of that stretch pass through a wet swamp after you pass Generelly?

A. Well, there is some woods out there; yes.

86 Q. How much?

A. I wouldn't undertake to say.

Q. Don't you know whether it is a small patch or a continued forest? How much forest does the Louisville & Nashville pass through between here and Rigolets?

A. If there is any there, I don't remember that it comes up to the railroad track.

Q. Do you know the character of that forest there generally, are there any trees at all on the side of the road between here and Rigolets?

A. Yes, sir; there are several bunches of shade trees.

Q. But swamps?

A. There is some willows that come along the right of way but not close to the track.

Q. I don't mean on the right of way, I mean on the sides. You don't recollect anything like a wet swamp there.

A. Yes; there is a wet swamp there, but I don't know to what extent.

Q. You don't know the character?

A. No, sir.

Q. Could you run a telegraph line through there?

A. I wouldn't like to try it.

Q. Do you know anything about the cost of clearing a swamp like that?

A. I never cleared any.

Q. As I understand your testimony, this right of way as possessed by the Louisville and Nashville is particularly suited for your purpose, is that right?

A. Yes, sir.

Q. You have nothing to do, you are under no expense to construct the line?

A. So far as the right of way is concerned.

Q. And to run through the swamps would prob-
87 ably be a considerable expense?

A. Well, yes; there are a lot of swamps in Louisiana you couldn't run a line through.

Q. You don't know anything about the character of these swamps?

A. Not off the railroad tracks; no, sir.

Q. Do you know of any other line supported by posts that are not on the right of way of the Louisville & Nashville, telegraph lines or lines of any kind?

A. You mean that runs east of our line on the Louisville and Nashville the same way?

Q. Yes.

A. Yes, there is another line out there.

Q. What is it?

A. The Postal has a line that crosses the road several times; I don't know where it goes, I never followed it up.

Q. Is it along the line all the way?

A. No, sir. It is a small line, three or four wires.

Q. Now, with regard to the maintenance of a telegraph line of the character you propose, is much work or expense necessary?

A. Well, it has to be patrolled and kept up.

Q. It has to be patrolled?

A. Yes, sir.

Q. How?

A. By a lineman or inspector, who goes along.

Q. Along what road, how is that patrolling done?

A. Any telegraph line of any description has to be worked over occasionally by a lineman.

Q. How does he go along there?

A. If it is a highway, ride out; if it is on a railroad, walk out or drive a velocipede car.

Q. How do you get the material out there?

A. You mean in this particular case?

Q. Yes.

88 A. It is hauled out on the train and distributed at the proper locations.

Q. That is between the stations?

A. Yes, sir.

Q. How many wires are there on these arms all together?

A. Twenty-five.

Q. What are they?
A. Copper and iron wires.
Q. Do they differ in use at all?
A. Yes, sir.
Q. In what?
A. Some are telephone and some telegraph.
Q. Do they differ in the purpose for which they serve; are they all used by the public?
A. With the exception of what you people use.
Q. The Louisville and Nashville?
A. Yes, sir.
Q. For what purpose?
A. To telephone and telegraph.
Q. To telephone and telegraph what?
A. The railroad business; I don't know.
Q. Where do these wires connect at the stations?
A. I don't qnite understand that.
Q. Into what stations do they run.
A. Into every station on the road.
Q. What road?
A. The Louisville & Nashville.
Q. Are they of any service, these wires, without these connections to the stations?
A. The ones that are used for the operation of the railroad I should think wouldn't be of very much use.
Q. They would be of use to the public, wouldn't
89 they?
A. The local wires wouldn't if they didn't cut in with the stations.
Q. With respect to these bridges you propose to use, have you any idea of the cost of these?
A. No, sir.

By a juror:
Q. You were talking about guy wires, do you have to put guy wires in the city also, or just in the swamp?
A. Just the swamp.
Q. In the city have you guy wires?
A. No, sir.
Q. I mean the solid ground from Tonti Street for about two or three miles?

A. There may be some there, but if I was going to construct the line I wouldn't put any there.

By Mr. Fenner:

Q. Is there any necessity for any there?

A. No, sir.

Q. Where they are necessary is where you get in swampy ground, soft ground?

A. Yes, sir; and exposed to the wind.

By Mr. Leovy:

Q. For what distance is that?

A. After you leave the high land and get out in the marsh where there is nothing to break the wind.

Q. About how many miles?

A. You mean beginning at the L. & N. tracks?

Q. I don't know where you begin.

A. I don't understand.

Q. In some places you need a strip thirty-two feet wide?

A. Yes, sir.

Q. Well, about how much of that will there be?

90 A. There would be about thirty miles of that.

Q. Do you know about what the length of the Rigolets bridge is?

A. The width of it?

Q. Yes, I mean from shore to shore, the length of it?

A. Well, it is around three thousand feet.

Q. Well, in order to make these repairs would your employees be obliged to make use of the bridge?

A. You mean to walk over?

Q. Yes.

A. Well, yes, they have to—they don't exactly have to but they do do it.

Q. They couldn't very well fix them from boats?

A. Yes; they could do it, but that is not the practice.

Q. Is it the practice to go on the bridge and run hand cars on it with material?

A. Yes, sir.

Q. And it is the same as to the other bridges?

A. You mean so far as running hand cars?

Q. Yes.

A. Yes, sir.

By a juror:

Q. Would that prevent the Louisville and Nashville or any other road—by your putting guy wires could they run posts, too?

A. Yes, sir.

Q. They couldn't put rails where these guy wires were?

A. No, sir.

By Mr. Leovy:

Q. They couldn't run rails?

A. No, sir; but we don't have to put guy wires except in the marsh.

Q. You have them now?

A. Yes, sir.

Q. With regard to this route you selected, do you
91 regard that as the best route along that road way?

A. I do.

Q. Why?

A. Because the line is already there.

Q. Is there any other reason?

A. I never looked at it with the view of building a line out there.

Q. You have never surmised as to why it was put there?

A. Because it is customary to take one side of the track or the other and build a line on it.

Q. Couldn't you build on the other side?

A. We could part of the way, a short distance.

Q. And as far as going out as far as these two miles is concerned running from the beginning of the expropriation, you could as well go on one side as the other?

A. I never looked at it; I couldn't tell you.

Q. You really don't know at all?

A. I wouldn't undertake to say.

Q. Are you the person who planned this new line?

A. No, sir.

Q. Who did?

A. There is no new line proposed.

Q. Well, to keep this line as it is—you are the person to do that?

A. I would be; yes.

Q. And you have never considered whether it would be necessary at the place I pointed out to you for the Western

Union wires to run along the side they are, and so far as you know they might run along the other side?

A. So far as I know; yes, sir.

Q. Then there is no necessity for crossing the track at that point?

92 By the Court:

Q. Is that the point where the switch yard comes in?

The witness:

I don't understand his question.

(Question repeated by stenographer.)

A. If I see the line at all right, it was originally built from there clear out there on this side of the track. This was moved on the other side since its construction because of the railroad making these improvements at Generelly.

Q. Where it is necessary for you to have a line, you don't know of any reason why this line should not be on this side of the track?

A. That I couldn't say off-hand.

Redirect Examination.

By Mr. Fenner:

Q. You say that it would not be absolutely necessary to have these guy wires even where you reach the swampy portion?

A. Yes, sir; I do.

Q. As a matter of fact, how are these guy wires placed, perpendicular to the track or parallel with it?

A. Some one way and some the other.

Q. They are not necessarily placed perpendicular with the track?

A. It is necessary to put some perpendicular; for use on the sides the storm guys we have to put perpendicular, in order to avoid the wind.

Q. You, as I understand it, can't give any estimate of what proportion of this line of the Louisville and Nashville from New Orleans out to Pearl River runs through this so-called cypress swamp—is it a small or large proportion?

A. Such a small proportion that I wouldn't undertake to estimate it. I don't remember seeing a cypress tree along the track. There are some willows out there that could grow up in a few years.

93 By Mr. Leovy.

Q. In respect to these arms you are using, are these the same length you use in the city of New Orleans proper?

A. We have three lengths of arms.

Q. What are the shortest ones?

A. Six feet.

Q. What are those you propose to use?

A. Ten feet, because they have ten wires on them and the six feet only has four.

Q. Do you use the ten-foot arms in the city of New Orleans at all?

A. All together; yes, sir, we are using them.

Q. That is a matter of convenience rather than necessity?

A. It is almost a necessity in a heavy line where we have twenty or thirty wires. If we didn't, we would have to have a pole so long that we could never hold it up out there in the marsh.

Q. About how high does that last arm have to be?

A. Along a private right of way it doesn't have to be very high.

Q. Then you have got to have more arms when they are shorter?

A. Yes, sir.

By Mr. Fenner:

Q. How many of these twenty-five wires are used solely for the purposes of the Western Union Telegraph Company?

A. They have two metallic telephone circuits out there—that's four—and they are using about three telegraph wires.

Q. That is the Louisville & Nashville?

A. Yes, sir.

Q. So that would be about eighteen Western Union wires?

A. Yes, sir.

94 J. D. HILBERT, a witness examined on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. What is your name?

A. J. D. Hilbert.

Q. Where do you reside?

A. Dallas.

Q. What is your connection with the Western Union Telegraph Company?

A. I am superintendent of construction and maintenance.

Q. How long have you occupied that position?

A. About two years.

Q. What was your occupation prior to that?

A. General foreman for the Western Union.

Q. How long were you in that position?

A. Since 1904.

Q. Prior to that time what did you do?

A. I went to work for the telegraph company in 1887 as foreman and have been with them ever since.

Q. So you have been connected with the Western Union Telegraph Company since 1884 you say?

A. 1887—twenty-five years.

Q. In the occupations of foreman, general foreman and superintendent of construction?

A. Yes, sir.

Q. Your general duties in these capacities were to take care of what is called the outside plant of the company?

A. Yes, sir.

Q. Are you familiar, Mr. Hilbert, with the line, the pole line, of the Western Union Telegraph Company along the right of way of the Louisville & Nashville Railroad from New Orleans to Pearl River?

A. Pretty much so; I have been over the line
95 a number of times.

Q. Will you state what is the general topography of the country along the line?

A. Generally swamp land; in fact, it is all swamp.

Q. Do you mean swampy or marshy?

A. Marshy.

Q. Is there much timber along that line?

A. Not much. There is some along this line, but I couldn't give you the points where the timber lies.

Q. There is comparatively little timber?

A. Yes, sir.

Q. Is the pole line of the Western Union Telegraph Company as now located along the line on the roadbed of the Louisville & Nashville for the most part, or off the roadbed?

A. It is on the right of way but not on the roadbed.

Q. If that pole line was to be constructed today, in so far as the proposition of the right of way is concerned, where the poles are situated has there been anything done in the way of work by the Louisville & Nashville Railroad which would decrease the expense of putting that pole line down there?

A. Not to my knowledge, not along the railroad right of way.

Q. With regard to the matter of maintenance, referring merely to that portion of the right of way occupied by the pole line, is anything required in the way of maintenance, I mean so far as clearing the right of way is concerned?

A. I am not sure about this track on the Louisville & Nashville, but I rather think they are supposed to cut the grass around the poles to keep fires from burning the poles.

Q. I am not talking about the track. I mean is it necessary to cut the grass around the poles?

A. To protect them from fire, yes.

Q. That would be necessary whether the railroad was there or not?

Q. To protect the poles?

96 A. Yes, sir; to keep them from burning in case of fire.

Q. Will you state whether or not this pole line as constructed, and as proposed to be expropriated in this suit, is properly constructed—that is to say, constructed in accordance with the approved practice and usage in the matter of the construction of pole lines, along railroad right of way?

A. We are not building that class of line now. That was built in 1884, setting thirty poles to the mile. From time to time they renewed the line and it became so heavy it was not safe, and they added one pole between the poles and for that reason the poles are sixty to the mile. Under modern construction we use forty to the mile.

Q. Is there ample clearness as regards the poles and cross-arms on this line as set forth on these maps and diagrams in relation to the railroad and the operation of the railroad?

A. Yes, sir.

Q. Would this line as shown on these maps and diagrams interfere in any way with the operation of the railroad so far as you know?

A. No, sir; they would not interfere.

Q. With regard to the guys which are used to support the poles there, are they so located as to interfere in any way with the operation of the railroad?

A. No, sir; they are not.

Q. Have you had any experience which would enable you to form any idea as to the ordinary value of such a right or easement as is asked for in this suit?

A. No, I have not. I wouldn't know what the value of a right of way would be to a telegraph company. I don't know what value the right of way would be. I know what has been paid by other companies.

97 Q. That is what I want to know.

Objection.

Mr. Leovy:

I object to that. An expert, if he had qualified as an expert, could pass upon the value of the land and the value of the different factors involved, but I don't think he can come into this case and attempt to pass on the value of the entire right of way.

Mr. Fenner:

Here is a man who has had experience in the purchase of that sort of right of way. If anyone is qualified to give an estimate as to the value, I think he is—

The Court:

How would the jury get at the value?

Mr. Leovy:

Because the question in this case—if they cannot get at the value from a knowledge of real estate and things of that kind, it is entirely unnecessary to have a jury of real estate holders—

The Court:

They are not expropriating any real estate. I don't understand how we can get at it. I am willing to sustain the objection if you can tell us how to get at it.

Mr. Leovy:

I have never heard of that question being asked before. He seeks a determination of the whole thing in one question.

The Court:

Wouldn't it be pertinent to show what other similar rights of way were acquired at—

Mr. Leovy:

I don't think there could be said to be a value for a franchise at all.

The Court:

98 I will let him answer the question.

Mr. Leovy:

I will reserve a bill.

The witness:

A. A right of way has been purchased for ten cents a pole and twelve dollars a mile; it varies in different parts of the country.

Q. Well, ten cents a pole; with sixty to the mile, would be six dollars, and you have paid as high as twelve?

A. Ten or twelve a mile.

Q. Between these limits, this being an average, you have bought rights of way of this sort?

A. We have one place where we purchased a right of way for pole lines?

Q. You mean to say a perpetual right?

A. Yes, sir; a perpetual right.

By the Court:

Q. What were the conditions under which these were purchased? Was that a right of way along a railroad track?

A. Yes, sir; along the right of way.

By a juror:

Q. Were there bridges along these roads, too?

A. Yes, sir.

By Mr. Fenner:

Q. Mr. Hilbert, with regard to these places where the pole line proposed, the pole line of the Western Union Telegraph Company, crosses the tracks of the Louisville and Nashville Railroad, I will ask you if it is proper under the conditions that those crossings should be made at those places?

A. Yes, sir; at Gentilly.

Q. And the next crossing?

99 A. The next crossing, that was put there when the line was built and why it was put there I don't know.

Q. Let's see which you mean. It crosses here at Gentilly—

A. That was done because of the right of way being so full of tracks. For that reason we had to move our line over there. We had a gang over there for a long time getting the poles so located as to satisfy the railroad company?

Q. That is true of that first crossing and the second crossing at Gentilly?

A. Yes, sir; to come back.

Q. And the other you refer to is the crossing at the bridge?

A. Yes, sir. I don't know why that crossing was placed there, but when the line was originally constructed it seems the attachment to the bridge was made on what I would call the north side of the bridge.

Q. Does that interfere in any way with the operation of the railroad?

A. No, sir.

Cross-Examination.

By Mr. Leovy:

Q. Those cases you have spoken about were where the property-holders were willing to sell the right of way?

A. No, sir—

Q. You are speaking of condemnation suits?

A. Yes, sir.

Mr. Leovy:

I ask that all that testimony be stricken out. It is an

element of such proceedings in this State that you can't even refer to decisions of the Supreme Court—

The Court:

Q. These were the verdicts of juries?

100 A. Precisely.

The Court:

I will have to instruct you, gentlemen, to disregard that evidence.

The witness:

There was one at ten dollars a mile that wasn't taken to court. Rather than take it to court the railroad company decided to give the right of way at ten dollars a mile.

By Mr. Leovy:

Q. The railroad gave whom?

A. The Mackie Telegraph Company.

Q. Where?

A. Along the Santa Fe, Texas & Oklahoma.

Q. Over the desert?

A. No, sir; down their tracks in Oklahoma.

Q. What else did the telegraph company do in addition to paying ten dollars a mile?

A. I know they don't give them any service at all.

Q. It doesn't carry the railroad messages?

A. No, sir.

Q. What railroad was that?

A. The Santa Fe, Texas and Oklahoma.

Q. You don't know anything about the purchase of rights of way in Louisiana?

A. No, sir.

Q. Have you ever agreed with any railroad company in Louisiana?

A. Agreed with them?

Q. Yes.

A. In what respect?

Q. As to a right of way?

A. I have had no occasion to ask for a right of way in Louisiana.

Q. Do you know what you are doing in consideration for the present right of way?

101 A. Yes, sir; furnishing a pole line for the Louisville and Nashville, and also additional wires to handle the Louisville and Nashville business. The L. & N. owns exclusively two copper wires used for telephone purposes. They are using two of the telegraph company's wires for telephone purposes and three wires for telegraph purposes.

Q. The three wires are theirs that they paid for?

A. The wires are all owned by the telegraph company with the exception of the two copper wires in the telephone circuit. But we are furnishing to the Louisville and Nashville five wires belonging to the telegraph company to handle the railroad business with.

Q. What are those telephone wires used for?

A. Train dispatching I believe—that circuit for train dispatching and the other for ordinary messages.

Q. Now, if you don't succeed in obtaining this right of way, of course the Louisville and Nashville would have to adopt some other route for these telephone wires?

Mr. Fenner:

I object to that.

The Court:

It is apparent to anybody. I will overrule your objection or sustain it just as you please. This is one of the things the jury has just as much right to determine as this witness.

Mr. Leovy:

I would like to have it in evidence.

The Court:

I will overrule the objection.

By Mr. Leovy:

Q. Will the telephone wires have to be removed

102 if you don't get this right of way?

A. Unless they make arrangement with the telegraph company. I wouldn't say what action would be taken.

Q. Or unless the court or jury saw fit to impose conditions?

A. I don't know what action would be taken in a case of that kind.

Q. Have you any idea why this route was ever selected, what advantage it possesses?

A. I expect when the Louisville and Nashville built the railroad, they called on the telegraph company and the telegraph company made a contract with them for a pole line over their right of way the same as with other railroads.

Q. I refer to this route you propose to use, what advantages has that over any other route?

A. It is cheaper to maintain and cheaper to construct.

Q. Those are the advantages you believe would be obtained from the right of way being there?

A. Yes, sir.

Q. Is that the only reason you want it on the right of way?

A. There are places we possibly couldn't construct for a right of way without going to a great expense.

Q. What places are those, what kind of places?

A. I am hardly familiar enough with the ground for a right of way just to give a sufficient answer to that, but the main advantage to us is in distributing material and in getting over the ground to maintain the line.

Q. In other words, those places where you propose to locate your line is of additional value on account of this proximity to the railroad?

A. Where they are now located?

Q. Yes.

A. Yes, sir.

103 Q. That makes it more valuable to you than the surrounding territory?

A. It is a matter of handling material.

Q. The only reason you can handle it better is because of the railroad?

A. If no other means of handling it were there.

Q. You haven't made any of those ten-dollar a mile propositions to the people in that neighborhood have you?

A. No, sir.

Q. What is the difference between that line as it is now constructed and as you propose to construct it on modern lines?

A. We haven't made any plans for building a line over there to my knowledge.

Q. I suppose you mean by that you propose to maintain it as it is?

A. I don't know. That's handled by a different department.

Q. Assuming you propose to maintain it as it is, what is the difference between that and the modern lines?

A. There wouldn't be quite as many poles to the line and less anchoring. That line was originally built on about thirty poles to a mile, and as additional wires were put on it was necessary to put in more poles, and an additional pole was placed between each of the old poles.

Q. You don't know of any particular advantages possessed by the side of the track you have occupied?

A. Not especially. The line was built through on that side practically all the way between here and Mobile. They always try to keep on the same side of the track as far as possible. It was built on what I should say the south side of the track between here and Mobile.

104 Q. Between that pencil line on the map where the expropriation begins in New Orleans and the place where the road turns, could you have your line on one side as well as the other?

A Not very well; the railroad company have a yard there.

Q. I don't mean there. I mean running from North Tonti in the city up to the first curve. I can show it to you on the map.

A. Well, the line was originally built here. This was built straight and this part was put over on account of the yard there.

Q. If you had to build it over, is there any reason for building it on one side instead of the other.

A. Well, I couldn't say, because I didn't give that any special attention, but I believe the line could be built a part of the way at least.

Q. Would you undertake to find a site for another telegraph line along there?

A. If occasion demanded it I would.

Q. Would it be as good or a better site?

A. That I couldn't say. I would have to make a careful survey of the ground before answering that question.

Q. You don't know what disadvantages that would entail?

A. No, sir; I couldn't say.

By a juror:

Q. If you didn't enjoy the privilege of the railroad bridge, what way could the line cross, by cabling?

A. Yes, sir, submarine cable.

Q. Would that be more expensive?

A. It wouldn't be any more expensive, but it is our object to keep out of cabling.

Q. It don't give as good service?

A. No, sir.

Q. Then there would be considerable benefit to you to have the privilege of crossing this bridge?

105 By a second juror:

Q. You couldn't get across them except by cabling?

A. We could; yes, sir. We could drive pilings and—

Q. That would be considerably more expensive than using the facilities you have in the bridge?

A. Yes, sir.

By Mr. Leovy:

Q. Then you do require expensive bridges for that pole line?

A. Yes, sir; but we could get along without them. We could cable.

Q. Would that give as good service?

A. No, sir.

Q. Well, either you do want to go over them or you don't, which is it?

A. We prefer to go on the bridges.

By a juror:

Q. If it became necessary to string additional wires for your business, could you do it with the same poles?

A. Yes, sir; if the business required. We have poles which would accommodate thirty wires.

Q. So that neither you nor the railroad would be embarrassed by these wires?

A. No, sir. It would be necessary in some places to set poles if we put additional cross-arms on.

By Mr. Leovy:

Q. Can you tell me how many miles of bridges there are between here and Pearl River?

A. No, I wouldn't like to say. I believe there is one bridge in the neighborhood of three thousand feet and several short ones. I wouldn't attempt to say positively; I don't know.

By Mr. Fenner:

Q. The Big Rigolets bridge is about three thousand feet?

A. Yes. I believe we have a special marine cable installed there recently—no, that was at Chef Menteur.

Q. At the Big Rigolets bridge you have poles?

106 A. Yes, sir; thirty-four poles.

Q. That bridge is about three thousand feet long?

A. Yes, sir.

Q. Now, as I understand it, there are three poles on the Little Rigolets bridge aren't there?

A. Yes, sir.

Q. What is the length of that bridge?

A. About four hundred feet.

T. P. CUMMINGS, a witness examined on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. Mr. Cummings, what is your residence?

A. New Orleans.

Q. What is your connection with the plaintiff corporation, the Western Union Telegraph Company?

A. District superintendent.

Q. How long have you been district superintendent?

A. Two years today.

Q. How long have you been connected with that company?

A. Twenty-seven years.

Q. Prior to your appointment as district superintendent of this district what was your connection with the company?

A. I was manager at New Orleans a little over seven years.

Q. The Western Union Telegraph Company does a telegraph business all over the United States, doesn't it?

A. Yes, sir.

Q. Has it got offices at Rochester and Buffalo, N. Y.?

A. Yes, sir.

Q. Those offices have been there for a great many years?

A. Yes, sir; a great many years.

107 Cross-Examination.

By Mr. Leovy:

Q. You have been representing the Western Union Telegraph Company how long?

A. Two years as district superintendent. Prior to that time, a little over seven years as manager of the New Orleans office.

Q. How many routes has it got out of the City of New Orleans along the Louisville and Nashville?

A. One route.

Q. Along how many routes do you send messages?

A. On the L. and N.?

Q. Yes, parallel with the L. and N.?

Q. We haven't any routes parallel with the L. and N.

Q. None?

A. No, sir.

Q. How about telephone company wires?

A. I presume they have a route.

Q. Aren't you physically connected with them?

A. No, sir.

Q. Hasn't your company been?

A. No, sir.

Q. Aren't these two concerns under identical management and control?

A. I couldn't say.

Q. Is it possible to send telegraph messages over telephone wires?

A. If equipped with the proper apparatus, yes, sir.

Q. The telephone company has a line through these swamps?

A. I think so.

Q. You don't know?

A. I have heard there is a telephone line.

108 By Mr. Fenner:

Q. Are you familiar with those lands through which that passes?

A. No, sir. I know there is a swamp.

Q. Are you familiar with the general topography through which this right of way of the Louisville and Nashville runs from New Orleans to Pearl River?

A. I have seen it very frequently.

Q. What is the nature of that country?

A. It is practically all swamp and marsh, or rather marsh.

Q. Is there much or any timber?

A. There is very little of it.

By Mr. Leovy:

Q. Mr. Cummings, the Louisville and Nashville Railroad sets up in its answer that it proposes to operate a commercial telegraph line. Does a line for that use—would it increase or diminish the business of yourself and the Cumberland Company?

A. I couldn't speak for the Cumberland. It would diminish our business.

C. A. TESSIER, JR., a witness examined on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. Mr. Tessier, where do you reside?

A. New Orleans.

Q. What is your business?

A. Real estate.

Q. How long have you been engaged in the real estate business?

A. Since 1899.

Q. Have you had occasion to look over and examine the land over which the Louisville and Nashville Railroad right of way that runs between New Orleans and Pearl River?

A. I have.

109 Objection.

By Mr. Leovy:

I object, if the Court please. We have just had a vigorous argument in which it was stated that the plaintiff was not seeking or asking real estate in this case.

Mr. Fenner:

Under decisions of the Supreme Court of this state, the jury in estimating the value of this easement, has a right to take into consideration the value of the land. We are not expropriating the land, but the value of the land has a relation to the value of the easement.

The Court:

Let him testify. We all know what the value of that land is.

By Mr. Fenner:

Q. What is the general nature of the property?

A. I have divided that up into various estimates. There are different grades of land. The land from North Tonti and the division of the Louisville and Nashville would be city lots.

Q. Up to what point?

A. To People's Avenue Canal.

Q. How far is that?

A. Across the country there it is about twenty squares or thirty squares at most. The value of that land in there would be about $150 a lot, or five dollars a front foot. From People's Avenue Canal the next division is from there to Michou Station. The high land in there I estimate at $200 an acre, and the wet or low lands at $75 an acre. And from Michou Station to the Chef would be all wet or prairie lands, which I estimate at $15 an acre; and from Chef Menteur to Lake Catharine would be graded went [wet] or prairie lands, and I would value it at $10 an acre; and from Lake Catha-
110 rine to Pearl River at an amount not to exceed $8 per acre.

Q. Now as I understand it, this portion that you said would be valued at about $200 a lot—

A. $200 an acre.

Q. I mean the first portion, what did you say that was, how much?

A. $150 a lot, of thirty feet frontage.

Q. And that extends for about thirty squares?

A. Twenty or thirty.

Q. And the next portion?

A. The next portion from People's Avenue Canal to Michou Station at $200 for the high land.

Q. That extends about what distance?

A. I have classed that in two classifications. It is hard to tell you how much high land—

Q. I am talking about the distance along the track—

A. From People's Avenue Canal you would have high land and then low land.

Q. I understand, but what is the distance from People's Avenue Canal to Michou Station?

A. I judge the distance to be not over three miles.

Q. Your next division is from Michout to where?

A. To the Chef.

Q. That is what distance?

A. That distance would be eight to ten miles—I am not positive.

Q. And the next division?

A. From the Chef to Lake Catharine, ten to fifteen miles.

Q. And the next?

A. Lake Catharine to Pearl River.

Q. Equally as much?

A. Yes, sir.

Q. Is there much or little of that land through which the right of way runs timber?

A. Timber?

111 Q. Yes, like a cypress swamp?

A. It formerly was swamp but there is nothing I can see to give it any value as timber land. There is nothing but scrub timber. It would hardly be salable for timber rights.

Q. How much of it is even covered with the scrub timber you are talking about?

A. At a point along the Louisville and Nashville from People's Avenue Canal to about Gentilly Station there would be some scrub timber, and from Michou on is practically swamp and prairie.

Cross-Examination.

By Mr. Leovy:

Q. I want you to help me do some figuring. Look at this plan and see how far that first section, the city lot section,

extends, how far your estimate of what you call the city property extends. You have given us various classes.

A. I have graded the land from the North Tonti intersection of the Louisville and Nashville to People's Avenue Canal. According to this map here it would be approximately a mile, speaking roughly.

Q. That highest class of property there you value at how much?

A. In that first sub-division at five dollars a front foot. In some instances more and some less, five dollars is an average.

Q. A lot is thirty feet by what?

A. 120 is the usual depth.

Q. Then a lot would be about 3600 square feet?

A. It would be about three thousand—that's right, 3600.

Q. And the value of that would be about $150. And property of that kind runs for about a mile?

A. If your scale is correct here.

112 Q. You haven't done any figuring with respect to this particular valuation? You don't know how many square feet would be included in a strip a mile long and thirty feet wide?

A. No, sir.

Q. Or taking the arms as ten feet, you don't know about that?

A. No, sir.

Q. Now the next strip, commencing on the other side of People's Avenue Canal, what have you estimated that property at?

A. Commencing at People's Avenue Canal and going to Michou, I have estimated the high land in there at $200 an acre and the wet land at $75 an acre.

Q. Now the railroad right of way in there is all pretty high, in that mile?

A. That's more than a mile.

Q. I am speaking roughly. Are you taking it all the way from Gentilly?

A. I took it from People's Avenue Canal to Michou—that would be about ten miles according to the schedule.

Q. And for the next twenty miles—

A. No not for the next twenty miles. From Michou to Chef Menteur—that would be almost entirely prairie land or marsh land, valued at fifteen dollars an acre.

Q. About how far is that?

A. Not in excess of ten miles. That leaves, I think, about eight miles more.

Q. How far is it from the Chef to Rigolets?

A. It must be about ten miles from the Chef to the Rigolets.

Q. What have you estimated that at, that swamp land, I think you called it?

A. There are two grades. From the Chef to
113 Lake Catharine it is worth more than from Lake Catharine to the Rigolets. The land from the Chef to Lake Catharine is worth about ten dollars an acre and from Lake Catharine to Pearl River, the highest price I could place on any of that land would be eight dollars an acre.

Mr. Fenner:

The plaintiff rests.

W. H. COURTENAY, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. Mr. Courtenay, where do you live?

A. Louisville, Ky.

Q. What is your occupation?

A. I am chief engineer of the Louisville & Nashville Railroad Company.

Q. How long have you been employed in that capacity?

A. As chief engineer seven years and a half, or a little over.

Q. And before that time?

A. I have been employed on the lines of the Louisville & Nashville as an engineer for 33 years, the large part of the time as principal assistant engineer.

Q. You have been in the engineering service of the railroad for many years?

A. For thirty-three years.

Q. Mr. Courtenay, a part of the answer of the defendant in this case is concerned with the damages it is claimed will

accrue to the railroad, or do accrue to the railroad, from the construction of telegraph lines along its rights of
114 way. Will you please state briefly what the nature of these damages has been from your experience?

A. The damages have been interruption of the movement of trains by reason of poles and wires blowing down and falling on the track. It has also been necessary for the railroad company to expend more money in cutting the grass and weeds off its right of way to avoid setting fire to telegraph poles than would have been necessary had not the telegraph lines been there. Ordinarily the cost of cutting off the right of way is twenty dollars a mile. In this heavy kind of grass in the marshes of Louisiana it is more. I haven't the exact figures at hand. The telegraph lines use the railroad's track and roadway for the materials of itself, materials for construction and repair. Our trains have to look out for such impediments and there is some danger of their leaving obstructions on the track. The telegraph lines frequently occupy space that is needed for railroad construction. In the last ten or twelve years on certain branches of the company's lines where we have been reducing grades and constructing a second track or repairing tracks, it was necessary to have the wires moved before such work could be done. In some cases the delay in getting these wires moved as promptly as they should be has caused the railroad quite a considerable amount of additional cost. We have a good deal of trouble with contractors on account of the delay, and they have made large claims against us in some instances on account of such delay. In this particular case in Louisiana we are put to extra expense in maintaining the bridge and trestle structures on account of the lines on them. The amount of that expense is difficult to ascertain in
115 figures. In the case of the Rigolets bridge, where the telegraph poles are supported by the piers of the bridge and the poles braced from the cross-ties, computations have been made that the effect of the wind on the girders of the Rigolets bridge is increased by fifteen per cent by reason of the wind pressure because of the impact of the wind on the wires and poles. The overturning tendency of the poles on the piers is increased by thirty to thirty-one per cent. Certain other trestles have suffered damage because of the effect of the poles on the trestles and we have made vigorous efforts to get them off. That, however, is not so much the case here,

but the conditions are similar. On the Bay St. Louis division the poles have been moved. These poles and wires are very greatly in the way when it becomes necessary to make any repairs to the bridges. We found them very greatly in the way after the disastrous storms of 1909 and 1911, which destroyed a considerable portion of the Rigolets bridge. We found them also very greatly in the way at the Bay St. Louis trestle, the greater part of which was destroyed by the storm of 1909. Wherever we have to replace the cross-ties, and that usually has to be done at intervals of about eight years—pine ties probably two or three years longer—we have to go to some additional expense on account of the presence of the telegraph lines which are in the way. When we have pile drivers in order to drive additional piles the wires are in the way and they have to be moved before the work can be done. We always transfer the cable boxings and attachments of the cable where the cables run under the draw spans, creating some additional cost of maintenance to the railroad company.

Q. Are those telegraph poles permanent structures or are they subject to overflow?

A. They are subject to overflow by storms and
116 also subject to destruction by decay.

Q. From your observation, Mr. Courtenay, would it be practicable for the telegraph company, if they owned or expropriated a strip the width of the arms and the width necessary for guys, that is ten to sixteen feet, considering the condition of that country, would it be practicable for the telegraph company, for the purposes of supply, to drive along that strip?

A. It would not.

Q. In order to do that what would be necessary?

A. To fill up large quantities of marsh and water and make a road. The only way to reach these poles now in many instances is by going directly out from the railroad roadbed.

Q. Could that be done from going to some fixed point or place, or would it be necessary to leave the track and go to the pole at each pole?

A. To go across the track to the side to each pole.

Q. So substantially all the right of way would be used from the track on that side on which the poles are placed?

A. Yes, sir.

Q. Would it be practicable, assuming there were no grades,

to construct your railroad tracks immediately under the arms of the telegraph poles?

A. It certainly would not be possible. The danger of imperiling employes and passengers would be too great.

Q. A strip of ten feet would have to be left clear; is that right?

A. Yes, sir.

Q. How much wider strip for safety's sake should be left?

A. The poles should be placed at such a distance so that they would not obstruct the track in the event the poles or wires were blown towards the track. That is the proper way,

117 and it has been endeavored to have them placed on the margin of the right of way to get them well away from the track.

Q. In order that the track should be free from a pole falling on it in swamps and causing a wreck, how far away should they be from the tracks, assuming the poles to be thirty feet long?

A. At least thirty feet away the base should be planted.

Q. Well then, there is supposed to be thirty feet that is to be kept clear from the tracks as long as those poles are there?

A. Yes, sir.

Q. As a matter of fact, are the poles in this swamp along this territory which this road passes through, are the poles that distance from the track?

A. Yes, sir; about thirty feet, and some closer. I have not measured them, but from an inspection or casual observation, where the water comes close to the railroad, some are much closer.

Q. Now it is averred in the petition that the taking of this property by the Western Union Telegraph Company will not interfere with the operations of the railroad company. In the first place, if the Western Union acquires the right to construct a line with these poles on that territory, will it be possible for the railroad company to construct a telephone or telegraph line of its own?

A. It will be possible, but at a greater cost for construction and maintenance.

Q. Let me understand. I asked you if the obtaining of this right of way by the Western Union, the plaintiff, would

make it impossible for the Louisville and Nashville to put another line on the right of way?

A. Not on the same strip.

Q. Do you know by what method the trains of the Louisville and Nashville are now handled so far as telegraph or telephone are concerned?

118 A. I do—by telephone service.

(At this time adjournment was taken until August 2 at 9:30 o'clock.)

August 2.

W. H. COURTENAY, again taking the stand, testified as follows:

(Direct Examination (Continued).

By Mr. Leovy:

Q. Mr. Courtenay, at the close of your testimony yesterday, I think you were testifying as to the presence of certain telephone lines of the defendant along the proposed route of telegraph line, and I think you said there were some telephone lines of the defendant Company on the Western Union poles. Is that correct?

A. I don't think I touched on that point. The company has some telephone wires on the Western Union poles, however.

Q. On the route between here and Rigolets?

A. Yes, sir.

Q. For what are they used?

A. For dispatching trains and handling the railroad business generally.

Q. Is the dispatching of trains handled all together by that means?

A. It is now, I believe.

Q. Mr. Courtenay, it is alleged in the petition that the present arrangement between the Western Union and the Louisville and Nashville will come to an end on August 17. Have you in your capacity as an officer of that company made any preparation to meet that situation in the direction of the construction of other lines?

A. I have not personally, no. But I know the
119 matter is being considered by the railroad company and estimates have been made of what is required.

Q. By some other officer over you or under you?

A. By other officers.

Q. Over you or under you?

A. One of them has been consulted who is under me, the signal engineer.

Q. Do you know what arrangements have been made—

Objection.

Mr. Fenner:

I object to that on the ground that it appears from the witness' testimony that he has no personal information of that.

The witness:

A. No, I do not.

By the Court:

That arrangements have been made for what?

Mr. Leovy:

That was shown by the previous question—for the construction of a telegraph line.

Cross-Examination.

By Mr. Fenner:

Q. I understood you to give some estimates, I think you said twenty dollars per mile, as to the cost of cutting the grass along this right of way. Am I correct about that?

A. Not exactly. I said the usual cost to cut the right of way of the railroad is about twenty dollars per mile per annum. I think the cutting of the heavy kind of grass on the New Orleans division will exceed that cost.

Q. When you say the cutting of grass along the right of way, you mean cutting it all along the right of way?

120 A. Yes, sir.

Q. For the purpose of preventing the cross-ties and the telegraph poles both from catching fire?

A. Yes, sir; partially that and partially to have the right of way in good shape. But the main purpose is to avoid fires.

Q. What I am getting at is this. Whether you had a telegraph line there or not, you would have to do that work?

A. But not so much of it. For many years we have had orders given to the section foremen to clear around the telegraph poles to prevent having the telegraph poles destroyed by fire.

Q. In other words, a certain proportion of that twenty dollars per mile would be necessitated by the presence of the telegraph poles there?

A. Yes.

Q. Now of course if a telegraph company has its line of poles along the right of way of a railroad company, such as is proposed in this case, they would have to cut the grass around their poles for their own protection, wouldn't they?

A. I don't know whether they would or not.

Q. I mean would they be under the same necessity, so far as their interest is concerned, as the telegraph company?

A. The farmer doesn't cut the grass along his fences for the protection of his fences. The railroad has to bear that burden. I think the cases are analogous. I see no more reason for the telegraph company's cutting it than the farmer, for it seems to me probable that the destruction of the poles, on account of the grass igniting the poles might give rise to an action against the railroad company for damages.

Q. That is an operation of law. Do you know what amount, if any, has been expended by the Louisville and Nashville Railroad in cutting the grass on this right of way?

A. No, I do not, but I think it can be shown by
121 the division officials. Personally, I don't know.

Q. You don't know whether any amount has been expended?

A. Yes, sir; because I know the grass has been cut.

Q. Around the poles of the Western Union?

A. Yes.

Q. You say you know that?

A. Yes, I have seen where the grass has been cut from time to time.

Q. Do you know, Mr. Courtenay, about how long this pole line of the Western Union Telegraph Company, as now established there, has been there?

A. No, I do not.

Q. About?

A. I know it has been there since my first connection with the Louisville and Nashville Railroad, the year 1886.

Q. That was about the time it was put there?

A. I don't know.

Q. It is a fact, is it not, that practically all the railroad lines of this country have telegraph lines along their rights of way, either there by arrangement or by virtue of condemnation proceedings?

A. I think that is the case, I don't know.

Q. So far as you know that is the case?

A. Yes, sir.

Q. Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its right of way, is it not?

Mr. Leovy:

I will object to that. I don't know the purpose, but if it is to show a compensative advantage, I submit
122 that it is improper and cannot—

The Court:

That is a matter of opinion as to whether it is an advantage or not.

Mr. Leovy:

That is not my point. I contend that he cannot show compensation, if it is an advantage. I can show your Honor authorities—

Mr. Fenner:

It seems to me that it is perfectly legitimate to take into consideration the advantage, as well as the disadvantage, which results to the railroad from the location of a telegraph on its right of way.

The Court:

I think it is a matter for the jury to consider. I will overrule the objection.

Mr. Leovy:

To which ruling counsel for the defendant reserves a bill of exception on the grounds stated to the question when asked.

The witness:

A. My answer is, it is.

By Mr. Fenner:

Q. That is necessary for the dispatching of business of the railroad company?

A. Telephone or telegraph for the handling of the business; yes, sir.

Mr. Leovy:

Do I understand that the Western Union proposes to give us the free use of its lines in case it gets the expropriation?

123 Mr. Fenner:

That is a matter we will discuss hereafter.

By Mr. Fenner:

Q. During the number of years since this telegraph line has been on this right of way of the Louisville and Nashville Railroad between here and Pearl River, you don't know of any wrecks that have been caused by the telegraph line, do you?

A. No, I do not.

By Mr. Leovy:

Q. Mr. Courtenay, you spoke yesterday of the increased wind pressure on the bridges. Do you know during that time of the destruction of any of the bridges of the Louisville and Nashville by wind pressure?

A. Yes, there were eight spans of the Rigolets bridge which were destroyed by wind, the storm in 1909 and again in 1911.

Q. Do you know the expense occasioned thereby?

A. No, I haven't the exact figures, but the expenses all together during that storm in Louisiana I think would be somewhere in the neighborhood of $200,000. All of that caused by the storm of 1909 would be about $200,000.

By Mr. Fenner:

Q. It is the storm of 1909 you have been referring to?

A. Yes, 1909. And the repairs to the Rigolets due to the

storm of 1911 would I think be somewhere in the neighborhood of $20,000 for that bridge alone.

By Mr. Leovy:

Q. What did you estimate the increased wind pressure from these telegraph lines to be?

A. On the girder spans it would be 15 1/2 per cent and the increased tendency to overturn the girders would be 31 per cent.

Q. Why do you estimate the wind pressure as a factor in the destruction of bridges?

A. That is always done in engineering practice.

124 Q. In the destruction of these bridges, how does it form a factor?

A. It forms an important factor, because in designing bridges one of the loads reckoned is the wind pressure. Broadly speaking, bridges are designed for three kinds of loads—the weight of the structure without the train, the train weight and the wind load. The effect of the wind is considered as much a load as the effect of the train.

Q. As a general thing, is increased expense involved to meet the increased wind pressure?

A. There is. It would require more metal and better anchorage.

Q. You couldn't give us an estimate of the additional expenses required by the presence of these telegraph wires?

A. No, not off-hand.

Q. Do you know about the cost of the Rigolets bridge?

A. The actual cost, I do not, because a great portion of the Rigolets bridge was constructed many years ago, and the superstructure has been reconstructed. The estimated cost of constructing the bridge as it stands now is about $243,000.

Q. Well, the cost of meeting the increased wind pressure, would that run into hundreds or thousands?

A. I think the proper designing of the piers particularly to meet the increased wind pressure would certainly be several thousand dollars. I am unable to give you the precise figures.

By a Juror:

Q. Isn't it a fact that the biggest damage done to the

bridges is done not by the wind but by the waves washing over them?

A. We have considered that matter as carefully as we can, and we are of the opinion that the main damage has been by the wind. At the Rigolets bridge, at the time the bridge was destroyed in 1909, the water came up only about
125 a foot above the bottom of these steel girder spans, and we did not think that the water, without the wind above the water, would have destroyed these spans, but we cannot ascertain the effect precisely of the water apart from the wind. The draw tender who was on the draw above the bridge in 1909 asserts positively that the water did not get above one foot above the spans.

Q. Didn't the wreckage break against them?

A. There was no evidence of any great wreckage at the Rigolets. There was some. I got there soon after the storm and I observed no great wreckage.

Q. You said that the damage in 1909 was $200,000. Do you mean to the bridge alone?

A. No, I mean to the railroad, embankment, track, bridges, trestles and all.

By Mr. Fenner:

Q. Isn't it a fact that in 1911, on the occasion of that storm, the poles of the Western Union Telegraph Company were not on that bridge at all?

A. I don't think the poles were on that part destroyed. I think they had cables.

Q. So the poles didn't cut any figure in 1911?

A. The portion that was destroyed in 1911 was a temporary structure put there until we could get the permanent structure manufactured. The structure in 1909 was a permanent structure.

By a Juror:

Q. In the event the company was to run their own poles, wouldn't they use the same bridge and string the wires just like the Western Union?

A. I think it doubtful. I think we would cable across to avoid the wind pressure. The higher the wires are
126 placed above the bridge floor the greater is the leverage. I have been endeavoring personally, apart from

this controversy here, to have the poles taken off of our line of trestles and bridges on account of the increased cost to us and the weakening effect on these structures. It has been the observation of our people who have the care of these trestles that they get out of line more where the telegraph lines are placed than anywhere else. We have to go to more expense in readjusting the track where these poles are. On that account and for the reason that the lines are in the way when we have to make repairs and drive additional piles, having to be taken down to clear the swing of the pile driver, I have been extremely anxious to get them off.

By Mr. Fenner:

Q. Of course you don't mean to give the jury to understand that if it is necessary to move the lines of the telegraph company to put in trackage or to remove the wires for repairing the bridge, that the railroad would have to bear that expense?

A. No, I didn't touch on that.

Q. That would have to be done by the telegraph company?

A. As a matter of fact, in the maintenance of these structures, we have to go to much expense in handling the work by reason of the presence of these telegraph lines. For instance, when we have to drive additional piles, to drive that pile on the pier having a telegraph line on it, it is necessary to remove the telegraph line to do it and some of the trestles we have had to move several poles, interfering with the swing of the pile driver, and it costs us a good deal more money. It is hard to get at the additional cost by the presence of these wires.

127

Mr. Fenner:

Of course it is a matter for the Court to instruct the jury about that. All I want to direct attention to, subject to the ruling of the Court, is that you would have a perfect right to require the telegraph company to remove the poles for the purpose such as the necessary repairs you have to make.

By a Juror:

Q. They do that in all cases when requested, don't they?

A. They do, but they are very slow about it, and we are often very greatly delayed. After the storm of 1906 I recom-

mended to the company that they get these lines off the long trestles. I then reported that I considered all telegraph lines a large contributing element in the destruction of these trestles.

By Mr. Leovy:

Q. Mr. Courtenay, I asked you some questions, which I evvidently didn't make clear, as to whether anything had been done in the direction of locating Louisville and Nashville telegraph lines—

Mr. Fenner:

I object to that for this reason. I think, under the authorities, it is very clear that the jury could not legitimately consider in this case the possibility of the Louisville and Nashville Railroad going into the telegraph business. That seems to me a matter to be considered when—

The Court:

He would be entitled to put that in to offset the advantage, as you claim to the railroad, of your having a line there if for no other reason.

128 The Witness:

If I may be permitted, I understood the previous question to refer to location of a wire, or line. The Louisville and Nashville Railroad ordered its employes, and the order came to me as head of the maintenance of the road department and also to a representative of the transportation department, and chief operator, to locate for the Louisville and Nashville a line of poles for a telegraph and telephone line for its own purposes. Such a location was made. I instructed Mr. W. J. Brown, roadmaster of the New Orleans division, to co-operate with Mr. R. R. Hobbs, chief operator of the railroad company, to locate a line of poles and lines for the Louisville and Nashville Railroad Company's use. That was done by them.

By Mr. Leovy:

Q. What line was located as to the New Orleans division?

A. They located a line substantially as that now occupied by the Western Union Telegraph Company.

Q. Do you know the reason for that choice?

A. The most important is that on nearly the whole length of this line between Michou and Pearl River on the north side of the right of way there is a canal, from which the material was excavated for the original construction of the embankment. If such a line were put parallel to the track and north of this canal we would get in much softer marsh, and it would be impossible to get the material for construction and repairs across the canal and intervening strip of marsh without much trouble to the line of poles and wires north of the canal. The ground is much better where the present line of poles and wires of the Western Union, south of the track, is constructed than elsewhere for this reason. The railroad through
129 that marsh is constructed over very soft ground, and preparatory to raising the embankment we had soundings made to ascertain the depth to which the material originally placed had subsided below the marsh level. These soundings were made by Mr. Brown. They disclosed the fact that the material which had been placed in the construction of the roadbed had squeezed out laterally a considerable distance. The location at present occupied by the Western Union's poles, south of the track, is on ground that has been made firmer and strengthened by reason of this material having been placed in the railroad company's embankment. If a line of poles and wires be placed south of the existing line of the Western Union Telegraph Company, it will get in very much softer ground. The nature of that material or soil for a depth of about fifteen or sixteen feet below the surface of the marsh is oozy marsh, and nearly all of the existing poles have to be guyed. If you place poles and wires still further south the anchorage would be more expensive. It would require better anchorage and better guys, better "dead men," as they are called, attached to the guys. In a great many places along the road, for example at Dunbar, where the Little Rigolets comes very close to our track, a telegraph line could not be placed further south than this existing without getting into very deep water. At Rigolets Station the water of Lake Borgne also comes in very close. Unknown Pass comes in very close at Lake Catharine Station. Lake Catharine itself comes in for a considerable stretch close to the road. At these points the Western Union location is far and above better in advantage that any other line, for it would be necessary

to locate a new line south of the existing line in deep
130 water in many places.

Q. If I understood you correctly, there are telephone lines now being used in the operation of the Louisville and Nashville running over your right of way which are supported by Western Union poles?

A. Yes, sir.

Q. In case the Western Union obtains an unconditional right of way over your right of way, what would you have to do with those telephone wires?

A. I assume that if the telegraph comes [company] gets exclusive use, we would have to remove them and find some other location for them.

Q. If it does not obtain the right which it claims, would it or not be possible for you to support these wires yourself by poles along that route?

A. It would—to construct poles close to and on the present line, and to transfer the wires of the Louisville and Nashville to the new pole line at a trifling expense.

Q. You spoke in describing this telephone line—did you mean to limit your description in this connection to a telephone line?

A. No, not necessarily. I see no reason why the Louisville and Nashville Railroad could not construct a telephone and telegraph line for general purposes.

Q. Would the line you speak of be adapted for use for general commercial purposes? Do you know anything yourself of the purposes for the use of such a wire?

Mr. Fenner:

I object to that question. What the future purpose of the Louisville and Nashville is—

The Court:

I think it is relevant.

131 The witness:

A. I do. I know of the order of the board of directors and the authority given by them.

Mr. Fenner:

I object to that on the ground that it is not the best evidence.

The Court:

It is the same thing he has testified to twice before. He testified the signal engineer and roadmaster did locate a line.

By Mr. Leovy:

Q. Did you receive any oral instructions?

A. I did, from the fourth vice president.

Q. To do what?

A. To have a Louisville and Nashville line of poles and wires located actually on the right of way by sending men over it to select the best location and to locate it and to indicate on our right of way maps where the best location is.

By the Court:

Q. For the poles?

A. Yes, sir; poles and wires.

By Mr. Leovy:

Q. Did these instructions limit the use of that line?

A. No.

Q. Were you instructed as to the purpose of that line?

A. We were merely given instructions to get the best location for poles and wires for telephone and telegraph purposes.

By Mr. Fenner:

Q. When you say you were instructed to locate this line, and it was actually located, explain what you mean. You mean simply that you had a route run which it is proposed the line would follow, is that what you mean?

A. Yes, sir. These two representatives of the company whom we had to locate the poles and wires went over
132 the line on special trains for that express purpose and they did locate them and reported on their location.

Q. That is as far as the matter has gone up to this time?

A. So far as I am informed it is.

Q. Mr. Courtenay, I want to ask you to give me approximately—when was it you received these instructions from the executive officers of the Louisville and Nashville Railroad to locate this line?

A. It has been a good many months ago. I think I can get that information for you by referring to my files.

Q. Was it less than a year ago?

A. Yes, I think it was less than a year ago.

Q. You say a good many months, about how many months ago?

A. I think I can find that for you.

Q. Do you remember when the trip was made for location?

A. The location in Louisiana—I don't know when. We made these locations pretty generally over the whole system and the orders were given at different times. I think it has been nearly a year ago since the orders were given. They were not all given the same time. The orders for one line were given at one time and one line at another. I don't recall when the order was given to locate here. Mr. Brown is here and he can testify to that. He received the order.

W. G. BROWN, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. Mr. Brown, what is your occupation?

A. Roadmaster of the Louisville and Nashville, New Orleans division.

Q. How long have you occupied that position?

133 A. About twelve years.

Q. The testimony has been here that you located, or assisted in locating, a telegraph line for the Louisville and Nashville Railroad. Is that correct?

A. In Louisiana; yes, sir.

Q. How long ago has that been?

A. Within the last six months.

Q. Can you get it nearer than that?

A. Not without looking up my file.

Q. Have you the file here?

A. I have some maps, I don't know whether the dates are on these maps or not.

Q. Do you remember your first trip to New Orleans to testify in April or May? I think it was in April. Was it before that first trip you made that inspection?

A. I think not, I think it was after.

By Mr. Fenner:

Q. You mean to testify in this case that was in the state court?

A. Yes.

By Mr. Leovy:

Q. Did you locate that line?

A. Yes.

Q. Have you ascertained the time?

A. No.

Q. What did you do in the way of location?

A. Selected a route for a telegraph line.

Q. Did you go over it?

A. Yes.

Q. With whom?

A. The chief wire inspector, Mr. Hobbs.

Q. Did you make any plans?

A. Yes, I located it on the right of way maps.

134 Q. What route did you select.

A. Practically the same route now occupied by the Western Union Telegraph Company.

Q. Why?

A. Because it was the best.

Q. Why?

A. Because it was the best and firmest ground. It was away from the canal which exists on the north side of the track.

W. H. COURTENAY, recalled to the stand, testified as follows:

By a Juror:

Q. Couldn't you have the Louisville and Nashville occupy the same territory?

A. I think there would be too much conflict. It is not an unusual occurrence for wires to drop down.

By the Court:

Q. For instance, here in the City of New Orleans, they

run a high voltage electric wire on the same pole with a telephone wire. They may drop down sometimes, but nevertheless they do it. Couldn't the wires be strung on the same pole?

A. Yes, that is done.

Q. Suppose here is the Western Union pole. You could either set your pole right here or set it right there. By putting your arm a foot lower or a foot higher, there would be no electrical interference, would there?

A. There would be no short circuiting under ordinary conditions. But where these wires are strung on the cross-arm, it is my belief—I am not a telegraph expert—it is my belief that if the line be tandem and reaching up higher in each there would be a great deal of danger of the existing wires coming into contact with the new pole. It might be that that could be avoided by putting on additional insulators. But it seems to me there would be many objections to such an arrangement, although it is not structurally impracticable. I think there would be so many objections that they wouldn't want it, but would want different locations. I have never known it to be done.

By Mr. Leovy:

Q. I want to draw your attention to the fact that this proposed route in several instances crosses the rails of the Louville and Nashville. Would that interfere in any way with having two lines on the same route?

A. I don't think that the interference would be much greater in that particular than elsewhere. They could diverge. If the wires were put above the old wires, it would mean a lofty pole, exposed to the wind, with a great leverage, and it would require a great deal more expensive construction.

By a Juror:

Q. Would it require increased anchorage?

A. Yes, sir; the leverage increasing with the length of the pole.

By Mr. Fenner:

Q. Wouldn't it be practicable to deal with the situation in another way? Wouldn't it be practicable to put other poles along between the present pole line of the Western Union and your track, provided you used a shorter pole?

A. I think that that would give rise to endless trouble. That marsh grass grows very tall, and at certain seasons of the year it is a common custom to fire that grass through the marshes. We have had to be very energetic to prevent the grass on our right of way from becoming ignited. If that is ignited and comes close to the wires, it would put them out of commission.

136 Q. You don't mean to say that the mere difference in height that would be necessary for the purpose of putting a line of poles on the inside of the pole line of the Western Union would be open to that objection?

A. I assumed that your question carried with it the provision that this new line would be so low that if it was blown over it would not foul the track. If you put in between, the cross-arms now being ten feet wide, you would have to come five feet nearer, and if they blew over they would foul the track. A passenger train might become derailed and create a disaster.

Q. What I mean is, how close do you suppose the wires would have to be to the ground to be affected by this consideration of fire in the grass?

A. I think they ought to be at least fifteen feet, probably twenty.

Q. Now of course if the grass was kept cut, that danger would be eliminated?

A. Yes, but that is an additional expense.

Q. But you do that anyhow?

A. Not all the time, but only when it gets dry enough to burn.

Q. In the seasons when there is danger from fire?

A. Yes. But the closer the wires are to the ground the more necessity there is of keeping it cut.

By Mr. Leovy:

Q. Do you know the height of the proposed Western Union poles in this case?

A. I have never measured the poles.

Q. As a matter of fact it is thirty feet. Do you know of any reason why the same convenience that induced the Western Union to choose that height wouldn't apply to the Louisville and Nashville Poles?

A. The higher the poles the more anchorage is
137 required and the greater is the danger of their falling down.

Q. Well, the height selected by the Western Union has been 24 feet above the ground. How far a distance would your line have to be from that line in order to avoid danger of being struck by the falling of the other line?

A. I would say at a rough guess they would have to be, to avoid danger of having the wires struck they would have to be ten or fifteen feet, but to avoid the danger of having the poles struck they would have to be twenty-four feet.

Q. Well, how far would your poles have to be from the track to avoid the danger of your poles falling on the track?

A. It depends on the height of the poles. There wouldn't be room between them to comply with these conditions.

By Mr. Fenner:

Q. How many wires did I understand you to say that the Louisville and Nashville had the use of on these poles now?

A. My understanding is that they have four telephone wires on these poles and in addition to that on part of the route they have signal wires that govern the drawbridge signal.

By a Juror:

Q. They have four telephone and two telegraph?

A. I don't know positively. I think the telegraph wires are the Western Union's. I dont' know of my own knowledge.

By Mr. Fenner:

Q. Assuming that you had six or seven wires, you wouldn't require but one cross-arm, and a very much shorter cross-arm than ten feet, in order to carry them?

A. Yes, I suppose six or seven could be lined on an eight foot cross-arm.

Q. One eight feet or two very much shorter cross-arms?

A. Yes, sir.

138 By Mr. Leovy:

Q. That is purely for the railroad business?

A. Yes, sir.

Q. Do you know of any difficulty in connection with the burning of timber on the way?

A. Yes, sir. Our custom is to burn old, worn-out ties. The rotten portions of the end we take out and cut off and burn and the sound portions of the stick we use for repairing. We want a place to burn it and the best place is on the south side, because there is no room on the north side between the embankment and the canal. To cross the canal would be expensive, so we burn our old ties on the strip between the track and the Western Union poles.

Q. How much does that cost?

A. How much does what cost?

Q. That additional expense?

A. I don't understand the drift of the question.

Q. I mean in moving the ties across the track?

A. If you had to move them across the canal it would probably cost three or four cents a tie.

Q. You don't have any idea of how many you move in a year?

A. No they are cypress ties and we probably move about 150 per mile, it varies a great deal.

By a Juror:

Q. You move them today on the south side of the track where the telegraph poles are, don't you?

A. Yes, sir.

Q. You don't have to put them on the north side?

A. No, sir.

139 A. R. FUGINA, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. What is your name?

A. A. R. Fugina.

Q. What is your occupation?

A. Signal engineer for the Louisville and Nashville.

Q. Mr. Fugina, is your railroad at present using an automatic signal system?

A. Yes, sir; in certain territory. On the New Orleans division in certain territory in isolated locations.

Q. Can you speak at all of the advantage of that system?

A. It is considered very much safer than the manual block system and the telegraph system.

Q. Does that require separate poles and lines?

A. Not necessarily, but it is considered very much better to place the wires on a separate pole line.

Q. Why?

A. Because we have considerable interference with the Western Union wires falling on the signal wires and the tendency to cross up the signal wires, making short circuits.

Q. Such cases are frequent?

A. Yes, sir. And consequently delays operation, interfering with the signals.

Q. Would the inability to have separate poles interfere with the installation of that system?

A. It would in my opinion. It would be much more preferable to have a separate pole line and a safer insulation.

Q. And I suppose with the increasing of the automatic signals the pole line becomes more important?

A. Yes, sir; the L. and N. is embarking on an extensive plan of automatic signals. They are putting them in quite fast, and I suppose in a short time we will have signals over a great part of our system, especially the more important lines such as this line.

By Mr. Fenner:

Q. How long have you been using these automatic signals?

A. I can't tell you how long the L. and N. has been using them. I have been connected with the L. and N. nearly two years and they were using them before I came here. They have been in use for twelve or fifteen years.

Q. You use them on the regular telegraph poles most of the time?

A. Yes, but we are now constructing our own pole line.

Q. Where?

A. On the Knoxville division.

Q. When did you start that?

A. We got the orders last April and started the construction work several months ago.

Q. Is that intended exclusively for automatic wires?

A. It is, I think. We may later put on some telephone wires, but it is my opinion that it is better not to put them on.

Q. Is there a telegraph line there?

A. Yes, sir; a very light line, with only a few wires on it, but we didn't think it advisable to use it.

Q. Is that your line?

A. No, sir; the Western Union.

Q. Suppose the Louisville and Nashville should establish a telegraph line of its own along this right of way here for the purpose of its telegraph business, do you mean to say you would establish two lines, the automatic and telegraph line?

A. Possibly not. That was being considered this year.
141 If we establish a separate pole line we would put the signals on it. The wires used for the railroad's business purposes are only a few, possibly six or seven. The Western Union have a very heavy line, in some places forty to a pole, which makes that a heavy line, and accordingly your interference is very much more. They are constantly changing wires and breaking our circuits. Every time the Western Union adds an additional wire to a cross-arm it puts the signal wire in interference. We have to change our wires. That is another reason why we want to separate.

ALLEN H. SNELLEN, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. You are the bridge inspector for the Louisville and Nashville?

A. I am.

Q. And you reconstructed, I believe, the bridges along the coast?

A. Yes, sir; I built all of them and one-half of the piers.

Q. What was the effect, if any, in the presence of the telegraph wires in that construction?

A. They had to be removed when we built the bridges. We couldn't do the work with the lines where they were. The wires were removed, the wires and poles taken down and the wires taken away and a cable laid across on the ties while we reconstructed the bridge.

Q. As to the effect of the wires on the ordinary repairs of the bridges, can you tell us anything?

A. It is very bad.

Q. Why?

A. From the fact that we cannot drive the piles.

142 Take Rigolets, for instance. There we couldn't drive one-half of the piles with the poles and wires in the present position. We would destroy them in the swing of the piledriver in getting the piles in the proper location.

Q. Can you give us any estimate of the amount of extra work caused by these wires in the repairs?

A. To drive the piles on the Rigolets bridge on the trestle work would cost a dollar extra each and in the piers in the neighborhood of five dollars extra on account of the long piles and we would have to keep them from destroying the poles and wires.

Q. How many of these piles do you drive in a year?

A. This year?

Q. An average?

A. We make it a practice of reconstructing every twenty years. Storms have caused us to do the work a little more than that.

Q. How many piles are there in these bridges?

A. I would have to make a calculation to get that.

Q. Well, make it. You needn't make it exactly, just roughly.

A. Well, there are more than a thousand—about 1200 piles in that bridge.

By Mr. Fenner:

Q. That is the Rigolets bridge?

A. Yes, sir.

By Mr. Leovy:

Q. That would be on an average the replacing of sixty a year?

A. Yes, sir.

By a Juror:

Q. Except in case of a storm?

A. Yes, sir.

143 By Mr. Leovy:

Q. Could you make any estimate of the total ad-

ditional expense caused by the presence of those wires on the bridge? Can you estimate the total annual expense caused by the wires on this bridge?

A. Yes, sir; I did.

Q. How much is it?

A. In the State of Louisiana $177.00 per year—the extra cost of driving the piles and damage to the timber and fastening the poles to the piles and the cost of removing the wires where we have to move them out of the way to do the driving.

CHARLES MARSHALL, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Leovy:

Q. What is your occupation, Mr. Marshall?

A. Superintendent of the New Orleans and Mobile division of the Louisville and Nashville Railroad with headquarters in New Orleans.

Q. How long have you been such superintendent?

A. Since September 1, 1886.

Q. You are familiar with the properties along the road of the Louisville and Nashville?

A. I am.

Q. Mr. Marshall, before I get into the rest of your testimony there is a matter, more largely of convenience than anything else—I would ask you whether you have figured from the estimates made yesterday by the plaintiff's real estate expert the value of that right of way it is proposed to take?

144 A. I have, but I didn't take the figures quite as high as his.

Q. Have you that memorandum with you?

A. I have.

Q. State the results you have arrived at.

A. From Tonti Street to People's Canal, 1.27 miles and 1.624 acres, at one thousand dollars an acre is $1624. From People's Canal to Lee, 5 1/2 miles, 5.60 acres, at $200 an acre is $1120. From Lee to Michou, 4 miles and 4.8 acres, at $100 an acre, $480. From Michou to the Chef, 6.65 miles and 8 acres at $15 an acre, $120. From Chef to the Rigolets, 11

miles, 13 acres, at $8 an acre, $104. From Rigolets Bridge to Pearl River, 6 miles, 7.09 acres, at $8 an acres $56.72—making a total of $3504 for a line having a width of ten feet, which was testified here yesterday as being the length of the cross-arm. But on the basis of thirty feet, taking in the guy lines of each pole, the estimate would be three times as great, or $11049 (?).

Q. Mr. Marshall, with respect to that estimate of thirty feet, by that you mean fifteen feet on each side of the telegraph pole?

A. Yes, sir.

Q. Now if you put the railroad track nearer than fifteen feet to the telegraph pole would there be any danger of interference?

A. With the guy line.

Q. And from the falling of the pole?

A. The pole would fall on the track also. These poles in the Louisiana marsh are about 85 feet apart only in Louisiana.

Q. Why do you say that in what connection?

A. My idea in saying that was that they are so close together they practically make a fence. I couldn't run a curved track around the poles. The line of poles would interfere with any track we might attempt to put nearer than fifteen feet of the pole line. In other words, for railroad
145 purposes a space of thirty feet wide is used up by them.

By the Court:

Q. You mean they don't run the poles in a straight line?

A. I meant the poles were close together. There is a guy line set fifteen feet from the pole, consequently no track can be put closer to the pole than fifteen feet. On the other side is another guy line, which makes thirty feet of the railroad's right of way taken away.

Q. That is the existing condition?

A. Yes, sir.

By Mr. Fenner:

Q. Of course you understand that if the Louisville and Nashville should ever want to put another railroad track in there, in accordance with the judgment we have got to move the wires and poles?

A. Mr. Fenner, we have a contract to that effect now, but we can't get your people to do this in any reasonable time—

By a Juror:

Q. How wide is your right of way?

A. You mean in Louisiana? After we get out of the city it is 100 feet wide on either side of the railroad. In some places it is 100 feet wide, or fifty feet on either side, but for the most part it is 200 feet.

Q. What is it through this marsh?

A. Two hundred feet.

By Mr. Leovy:

Q. Of that space what is about the space that can be used for railroad and telegraph purposes? Can you give us any idea about that? What is the space that is available for railroad and telegraph purposes, is it all equally adapted for this purpose?

A. Originally it was, but at the present time, no.
146 On one side of the railroad, that is, the north side, or as we call it, the west side, there is canal, wide and deep, that runs along the railroad track. On the other side, while there is no canal, the ground within fifty feet of the railroad embankment is more solid than when you get a greater distance away. That comes from the earth, which through these many years the railroad has been depositing there, which has found its way under that upper crust, and has been used for filling depressions and caves, which has made within fifty feet of the track a firmer foundation for telegraph poles than you would find 100 feet off. So for that reason a line within fifty feet on the south side is better adapted than further away.

Q. Assuming the Louisville and Nashville will never need that thirty feet of space, which it is necessary so long as the telegraph lines are there to keep clear, can you give us any idea of the value of that right of way of the telegraph line from those figures?

A. I have testified that its value today is $11049 (?).

Q. Do you know about any probability of the laying of rails in the immediate future in that thirty foot strip?

A. No, I do not; but we are constantly building tracks and extending existing tracks, and in addition to that con-

structing buildings and repairing buildings, and establishing signal posts, and the Western Union is in the way, although under the present agreement they must get out of the way of such work, and what they do is to move to another part of the track and use as much space.

Q. Can you tell us anything as to the effect of the existence of the telegraph lines upon the railroad rights
147 of way and bridges?

A. Yes. These lines are blown down and fall on and obstruct the track. It is necessary to move them on the bridges so that the repair work can be done. It is necessary for the employes of the telegraph company to enter into the use of the track and bridges. It is necessary for the railroad company to take precautions against damaging the telegraph line by clearing a space around every pole of the grass that might take fire and burn the pole. It is necessary to use great care in burning old cross-ties so as not to damage the wires overhead. This timber must be carried over to the other side of the track, or carried away from the line before it is burned and in that way the telegraph line is a burden on the operation of the railroad.

Q. Have you had actual occurrences of the kind you have described?

A. Yes. We have had train interruption by the falling of the telegraph lines on the track. We have had poles burned on account of fire from the grass being allowed to grow a little too high by the negligence of the foreman. We have damaged the wires by heat of the fire. We have been delayed by their not getting out of the way in time for us to do our work after due notice. I believe that these are the instances.

Q. Have you figured out the additional expense of that kind?

A. I have not, and it is not possible to do it.

Q. Have you sufficient information to know whether it would run into the hundreds or thousands?

A. No, I believe a witness here testified that it costs $177 as the extra expense of maintaining the bridges in Louisiana a year because of the wires on them, and a sum of which $177 is six per cent—

Q. Well, the jury can figure that. You haven't figured out the additional expense?

A. No. It would be about three thousand dol-
148 lars, wouldn't it—

Q. I don't mean as to the bridges. I mean the annual extra expense on the road itself on the land.

A. You mean in all these various ways?

Q. Yes.

A. I have not.

Q. You know it has been considerable?

A. I know of one case, not in this territory but outside. I know of one case that cost us $107.

Q. The conditions are not very different outside of this territory, are they?

A. About the same.

Q. Have you any file that will show us the date, or indicating the date, as to this location of the Louisville and Nashville Telegraph line?

A. Yes. The chief engineer wrote to me on April 18, and I received the letter on April 20, and I gave instructions on the same day it was received to the roadmaster to locate a line in Louisiana in conjunction with the chief operator of the line, which he did, and indicated the location on the blue prints which I turned over to your office.

By a Juror:

Q. Isn't it a fact that the Louisville and Nashville still has room enough to put one or two tracks without ever going over the guy wires of the Western Union?

A. Not on that side—no track at all.

Q. I mean you would have to build up the roadbed?

A. In answer to that I would say that six weeks ago we just simply widened the present embankment, making it wider, so as to offer greater resistance to the tide water in storms. Just this side of Rigolets is a place where we wanted the Western Union to get the poles further back. It
149 has not been done yet. Every now and then in work such as that, they have to get back, consequently there is no room for us to build another track.

Q. But as you would continue to build your roadbed that would continue to make the ground more solid further to the south just the same as it makes it now?

A. Yes, sir; but the making of the roadbed solid in the Louisiana marsh is not an immediate action of our work. If

our track had the elevation justified by the amount of material put there in the last twenty years, it would stand between thirteen and fourteen feet high, but as a matter of fact its average is only six feet. That dirt has spread out in either direction. At one place this side of Chef Menteur where we put a grade up to 6 1/2 feet for a mile, that is, from the Chef Bridge to Thomas Bridge 6 1/2 feet uniform, the engineers report to me that the grade is along a horizontal curve, showing it has gone down and in going down the dirt has gone down below the crust and has spread below the crust.

Q. But that would continue to do that whether the telegraph wires were there or not?

A. Yes, but it is giving a solid foundation in the marsh on the side.

By Mr. Leovy:

Q. Assuming, leaving out for the present the question of the amount of damage the telegraph line would inflict, could you give us any idea of the advantages they are getting the facilities of, for instance, that roadbed, have you any idea what that cost?

A. We spent three hundred thousand dollars on it in '91, '92 and '93, and it was all washed away and we subsequently spent, since 1909 we put about two hundred thousand dollars on it, consequently it upsets our calculations.

150 Q. Now how about these bridges they propose to use, what about the cost of them?

A. The Rigolets bridge has been damaged at various places during my incumbency as superintendent. It has been repaired by a different construction and more costly. Three years ago eight or nine steel spans of it were swept out by the storm and were replaced. That's been a very costly bridge. It is 2546 feet long.

Q. The Western Union gets the benefit of repairs like that?

A. Yes.

Cross-Examination.

By Mr. Fenner:

Q. Mr. Marshall, if I am correct in my understanding, in your figuring out the value of this right of way which you say is occupied by the Western Union you have done that upon the theory that the Western Union actually, exclusively

occupies the strip of land of that right of way—what is the width?

A. Thirty feet.

Q. As a matter of fact all that is actually, physically occupied by the Western Union of that strip of thirty feet to which you refer is that portion of it that is occupied by the poles of the Western Union, I mean physically?

A. No.

Q. What else is there?

A. Twenty or twenty-four feet above the ground, numerous cross-arms ten feet long, with twenty-five wires on it.

Q. I am talking solely about the ground, the soil. I say all that is occupied of that thirty feet you refer to is the portion occupied by the poles, that and the guy wire anchors?

A. As to the ground strictly, yes.

Q. So far as all of the surface of that thirty foot strip between these poles, it is just as free for your use
151 today, assuming you didn't want to put in more tracks, as if the Western Union, weren't there?

A. Or houses or burning ties.

Q. Leaving aside the question of other matters, it is just as free for your use as if the Western Union, weren't there?

A. Outside of tracks and houses.

Q. Assuming, for the purposes of this question, it was true that any right of way we get judgment for in this suit would be subject to the condition that if the Louisville & Nashville requires any additional portion of that right of way for additional tracks or depots or railroad facilities of any kind that the Western Union has got to get out of the way, then it wouldn't be, assuming that to be true you couldn't say the Western Union was occupying any thirty foot strip along that right of way?

A. You should add one other assumption. That is that we want that space for our own telephone and telegraph and signal line for the operation of our trains, and you are in the way.

Q. Eliminating that question, and what I have stated is true?

A. Yes.

Q. And it is equally true, so far as the use of that strip by the Louisville and Nashville Railroad for telegraph pur-

poses, if it be a fact, that they could put their line there consistently with the line of the Western Union remaining there?

A. If we did that, we should have to make our poles lofty enough to be above you, or shorter.

Q. Could you tell me, Mr. Marshall, about when was it that the telegraph line was built of the Western Union—about 1884, wasn't it—can you tell me when it was built, the approximate time?

A. It must have been earlier than that, because I was agent here in New Orleans in 1881 and sending messages on it then. I think it was built in '71 originally. It was,
152 of course, a small wire in '71—it must have been about '71.

By Mr. Leovy:

Q. As I understand it, the Western Union occupies all of this space as a man occupies a house, that is, he is not all over it at any one time. Is that correct?

A. Yes, sir.

ALLEN H. SNELLEN, a witness previously examined on behalf of the defendant, recalled to the stand, testified as follows:

By Mr. Fenner:

Q. You were the witness here, weren't you, that made that estimate of $177 extra cost of the maintenance of these bridges resulting from the telegraph wires?

A. I am.

Q. You say you made that estimate, how did you get at it?

A. I got it from what I know about the construction of the pile piers; also the delay of getting our boats around the poles. We make an examination about every year of the piles. We do that with a diver on a boat. We have to figure the delays on that and cost of delay in driving the piles; also the moving of the poles, everything of that sort.

Q. That is a statement of how you did it, but you have arrived at the definite figure of $177. You must have arrived at that by some process?

A. We make a calculation that these piles would cost us a greater amount to drive on account of these poles. We calculated what it would cost us to move the poles and wires

out of the way. You have got to get them out of the way. You couldn't reconstruct the bridge without moving them, consequently you have to move the poles and wires out of the way. I have estimated the cost of moving them out
153 of the way to drive the piles. One-half of the piles we couldn't drive with the poles and piers in the present position. Of course I had to figure on what the cost of moving the wires would be and the cost of the delay in driving the piles. It is a question I actually know from my experience in this nature of work. I couldn't tell you in detail how I arrive at this, but I make estimates in the work and I am very careful in making estimates, I'm not ever out of the way much.

Q. But you got at $177 some way, what figures did you use?

A. A pile costs so much to drive. I figure the piles cost us as high, some of them, as fifteen dollars to drive them. I took into consideration the delays we have in driving the piles. Of course no man can figure to a cent what a thing will cost, but I have been very liberal. I am satisfied my estimate is below what it would cost.

Q. You can't come any nearer than that in explaining how you came to get $177?

A. I could drive a 100 foot pile at the Rigolets without the wire being there, say, for $14. That is the actual general average of these piles. We drove 8 3/4 piles per day in 1909. We had to clear the way to drive the piles, we had two piles there that had some wire stretched across the way and that delayed us one-third of the time. I suppose we would lose as much as twenty-five minutes in getting the pile by the wire to keep from breaking it. I couldn't tell you how I figured this. It is something I know like I am living. I couldn't explain to you hardly how I know I am living, but I know it.

154 Mr. Leovy:

I think that concludes our oral evidence.

Offers.

Counsel for defendant offers, produces and files in evidence a copy of the articles of association of the New York and Mississippi Valley Printing Telegraph Company, referred to in the answer.

Copies of the New York acts of 1848, referred to in the

answer, and of the acts of 1851, 1862 and 1870, and of Section 701 of the New York laws of 1909, referred to in the answer.

Copy of the act of April 4, 1856, changing the name of the company.

Contracts between the defendant and plaintiff, and notice attached thereto, to be found in the transcript from the state court, pages — to — thereof.

A certified copy of the charter of the Louisville and Nashville Railroad Company; also a certified copy of the resolution amending its charter.

Certified copy, and certificates annexed thereto from the office of the secretary of state of Kentucky, showing, among other things, the filing of the amended articles in the office of the Kentucky Railroad Commission and the Kentucky secretary of state; also a certified copy of the same resolution from the Circuit Court of Jefferson County, Kentucky; also certificates, and documents thereto annexed, from the postmaster general of the United States, showing the acceptance of the postal act.

155 J. D. HILBERT, a witness previously examined on behalf of the plaintiff, and recalled to the stand in rebuttal, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. Mr. Hilbert, in the course of your direct examination you said, as I recollect it, that if this line were going to be built anew again that you would probably have fewer poles to the mile than now. Is that correct?

A. Yes, sir.

Q. According to your improved ideas how many poles to the mile would you have?

A. Lines of that class, about fifty poles to the mile.

Q. What would be the consideration that would influence you to have less poles?

A. The cheaper cost of construction.

Q. In other words, the cost of the telegraph company would be cheaper to have fewer poles if you thought you could get along with them? From the point of view of the railroad company, how would that be?

A. The cost of construction would be cheaper, but—

Q. I mean to say from the point of view of the railroad company, would it be better to have more or fewer poles?

A. The more poles you have the less chance of falling, the strain is less on the wires.

Q. With regard to the practicability of the Louisville and Nashville Railroad putting up on that right of way another pole line, in the event it should desire to put up a pole line of its own, will you state what you have to say in regard to that?

A. If they want to build another line, as the tracks are now, a ten or twelve foot line can be built nearer to
156 the track that would carry twenty wires, a twenty foot pole set about 5 1/2 or six feet in the ground. A line of that sort could carry two cross-arms, a ten foot arm or a shorter one carrying six or seven wires. With two arms on it would get a clearance of about fourteen feet above the ground—

Q. Would that be sufficient?

A. About thirteen feet above the ground, that second arm would be. That would be sufficient. A number of poles have less clearance than that. If we can get a ten and a half foot clearance, we are safe.

Q. What would you say with regard to the practicability of the suggestion discussed here to put another pole line on exactly the same route occupied by the Western Union?

A. That could be done.

Q. But you think the other would be better?

A. The other would be better. To have another pole line in there either above or below the present line it would be necessary to protect the lines from the poles built in there. If you set longer poles, you would have to set longer arms to protect the other poles. If you set shorter poles, you would have to place additional arms and brackets on our poles to keep them from touching.

Q. That would involve additional cross-arms?

A. Yes, sir; additional expense.

Cross-Examination.

By Mr. Leovy:

Q. Do you think a shorter pole situated some distance

away would do for the Louisville and Nashville? Why don't *you have that for yourself?*

A. When that line was built, the company used thirty foot poles almost exclusively. In our construction in the
157 last few years we did use poles of that class. In fact, a pole line out of New Orleans now with twenty foot poles we figure will carry about twenty wires.

Q. You don't really need thirty foot poles then?

A. Not if that line was to be reconstructed thirty foot poles would not be used.

Q. Yet you are going to do it?

A. What?

Q. Keep on with those thirty foot poles?

A. As long as the poles are there, we wouldn't take them out.

By Mr. Fenner:

Q. That wouldn't make any difference from the viewpoint of the railroad?

A. No.

By Mr. Leovy:

Q. How near to the track could the telegraph poles be put?

A. A twenty foot pole you ought to put the pole a good fifteen feet away, a twenty foot pole, set five feet in the ground.

Q. Do you know the width of a railroad spreader?

A. No, but I should judge it to be about eight or ten feet.

Q. Isn't it fourteen?

By Mr. Fenner:

Q. What is a railroad spreader?

A. A machine to spread dirt, as I understand it, a machine having a flange to the side to shove dirt out from the track.

By Mr. Leovy:

Q. They are being operated on the Louisville and Nashville now?

A. I believe so.

By Mr. Fenner:

Q. Am I correct in my understanding that where these

guys are necessary on this line that they occupy a
158 *space of about fifteen feet on each side of the pole?*

A. Not necessarily. I think that an average of about eight feet on each side of the pole—

Q. About eight feet is sufficient?

A. That guy wire is differently place [placed] according to circumstances. It is generally placed under the second arm.

Q. In its relation to the track, is it always perpendicular to the track?

A. Yes, sir; it is perpendicular; sometimes they are parallel. Where we put on a four wire guy, the guys are four ways from the pole, but the majority of the guys on the Louisville and Nashville are at right angles to the track.

Q. They occupy how much space?

A. About eight feet on each side of the pole, it might be more.

By Mr. Leovy:

Q. Don't they extend as much as fifteen feet on the side of the pole?

A. I hardly think so.

Q. Do you know?

A. There might some possibly be fifteen, but I don't think they will average that.

G. B. STRAUGHN, a witness previously examined on behalf of the plaintiff and recalled in rebuttal, testified as follows:

Direct Examination.

By Mr. Fenner:

Q. You are thoroughly familiar with the Western Union line from here to Pearl River?

A. Yes, sir.

Q. What is about the average distance occupied
159 by these guy wires on these poles?

A. The present guys are about ten feet, some a little more and some a little less. The average is about ten feet.

Q. Is that sufficient for the purpose?

A. They are answering the purpose.

Cross-Examination.

By Mr. Leovy:

Q. Is that sufficient or not? We want to know how much land you want to take?

A. If we were going to reconstruct that and put in a new pole line we would not set it as high and consequently the present location of the anchors would just about right.

Q. But if you get this right of way—how much do you require for the guys on the present poles?

A. About fifteen feet I would put it.

Q. If you had to make an estimate and stick to it hereafter and not ask for any more land, how much do you want?

A. I don't hardly think that would be for me to decide.

Q. Just an indefinite quantity? How much do you think might be necessary?

A. I can't answer that question.

Q. You can't tell how much would be needed?

A. I wouldn't undertake to answer.

By Mr. Fenner:

Q. To properly guy these poles there, considering their height as thirty feet, can you tell me what would be the outside limit?

A. From the pole?

Q. You said at present they are about ten feet—

The Court:

He said before two-thirds of the height of the pole above the ground.

160 The Witness:

It is customary to set the anchor about two-thirds of the height of the pole above the base. It can be nearer as circumstances call for.

Counsel for the defendant made a formal motion to direct a verdict for the defendant.

At this time recess was taken until two o'clock p. m.

Court reconvened at 2 o'clock.

The Court:

I will overrule the motion.

Mr. Leovy:

Counsel for the defendant reserves a bill of exception on the grounds stated in his motion.

161 CHARGE OF THE COURT.

Gentlemen:

In this case your sole duty is to fix the damages that the Western Union Telegraph Company shall pay to the Louisville and Nashville Railroad Company. I charge you that the telegraph company is entitled, under the law of the State of Louisiana and the federal statutes, to this right of way. It is not necessary for you to determine for how much width of the line this right of way shall extend, but of course that is a matter for you to consider in arriving at the damages.

Now you are the sole judges of the facts in the case and the sole arbiters of the amount of damages. You may draw upon your own experience as men of affairs as well as determining that amount from the evidence you have heard, and you should take into consideration every element that will amount to the damage of the railroad—the question of inconvenience, the question of added expense, any question of that sort such as you have heard testified to before you.

I will give you the charge requested by the plaintiff, which puts in legal terms the matters you may consider: You should award such a sum per mile as will in your opinion, under the evidence adduced, fairly represent: First, the saving in expense, if any, to the plaintiff company resulting from improvements, such as clearing, filling, bridges, etc., made by the defendant upon the portion of the right of way on which the plaintiff's telegraph line is to be located. (Of course you understand the plaintiff is the Telegraph Company.) Second, the extent to which the value of its right of way to the defendant for railroad purposes will be diminished by the location thereon of plaintiff's telegraph line. In this

162 connection, however, you will not be justified in taking into account added convenience or saving of ex-

pense resulting to the plaintiff merely from the fact of the location of its telegraph line on defendant's right of way in close proximity to the railroad, or the diminution in value of defendant's property for other possible uses than railroad uses or for additional railroad uses.

Now, gentlemen, of course it is intended to convey by that last paragraph that you must not take into consideration as an element of profit to the railroad that the telegraph company can conveniently use that right of way for getting out its poles, but you may, however, take into consideration any inconvenience that may result by the telegraph company's use of the railroad's right of way for its purposes. You may also consider that the railroad company, for railroad use, may want to erect this railroad signal system talked about, and they would have a right to own a telegraph line. These are all matters for you to consider. After you have considered all these things, then apply you [your] knowledge of business and human affairs, considering the different angles and probabilities of the case, and then fix such damages as you think will compensate the railroad for the use of this right of way by the telegraph company.

You will elect your own foreman and write your verdict upon the back of the petition or on a separate paper and attach it to the petition.

Mr. Leovy:

I understand your Honor has refused my request for a charge in favor of the defendant. I except to that. I will also ask your Honor to direct the attention of the jury to the fact that we are entitled to reasonable compen-
163 station, taking into consideration our expenditures for improvements.

The Court:

I will give you that charge, gentlemen, as Mr. Leovy has stated it.

A Juror:

Can we not render our verdict in addition to giving money damages that the telegraph company shall give the railroad company an arm?

The Court:

No, that is not part of your duties. You can only fix the damages..

Mr. Leovy:

I must reserve a bill to that charge. I think the jury has a right to impose one condition as well as another, that they should render certain services whether they offer to do so or not.

The Court:

You may be right, but I don't think so. My understanding is that all the jury can do is to render a verdict for so much damages.

Mr. Leovy:

I think the jury has a right under the Louisiana statutes to decide what shall be taken, and I think it has a right to impose this condition. I will reserve a bill.

The Court:

Gentlemen, of course if you find for the plaintiff you must express your verdict in a certain sum. Your verdict will simply be "for the defendant," if you so find.

Mr. Leovy:

I will also except to the charge that the plaintiff has a right to expropriate.

164 EXHIBIT MARKED "PLAINTIFF ONE."

Filed August 1st, 1912.

Laws of the State of New York by and Under Which The Western Union Telegraph Company Is Incorporated and Organized, Together With the Certificates Executed and Filed as Required by Those Laws.

165 Chap. 265.

An Act to Provide for the Incorporation and Regulation of Telegraph Companies.

Passed April 12, 1848.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, or from and to any point within this State, upon such terms and conditions, and subject to the liabilities prescribed in this Act.

Sec. 2. Such persons, under their hands and seal,* shall make a certificate which shall specify:

1st. The name assumed to distinguish such association, and to be used in its dealings, and by which it may sue and be sued.

2d. The general route of the line of telegraph, designating the points to be connected.

3d. The capital stock of such association, and the number of shares into which the stock shall be divided.

4th. The names and places of residence of the shareholders, and the number of shares held by each of them respectively.

*So in original.

5th. The period at which such association shall commence and terminate, which certificate shall be proved or acknowledged, and recorded in the office of the clerk of the county, where any office of such association shall be established, and a copy thereof filed in the office of the secretary of state. Such acknowledgment may be taken by any officer authorized to take the acknowledgment of deeds of real estate, at the place where such acknowledgment is taken.

Sec. 3. Upon complying with the provisions of the last preceding section, such association shall be, and hereby is declared to be, a body corporate, by the name so as aforesaid to be designated in said certificate; and a copy of said certificate, duly certified by the clerk of the county where the same is filed and recorded, or by the secretary of state, may be used as evidence in all courts and places, for and against any such association.

Sec. 4. Such association shall have power to purchase, receive and hold, and convey such real estate, and such only as may be necessary for the convenient transaction of the business, and for effectually carrying on the operations of such association, and may appoint such directors, officers and agents, and make such prudential rules, regulations and by-laws, as may be necessary in the transaction of their business, not inconsistent with the laws of this State or of the United States.

Sec. 5. Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines; provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this state.

Sec. 6. If any person over whose lands said lines shall pass, upon which said posts, piers or abutments shall be placed, shall consider himself aggrieved or damaged thereby, it shall be the

duty of the County Court of the county within which said lands are, on the application of such person, and on notice to said association (to be served on the president or any director), to appoint five discreet and disinterested persons as commissioners, who shall severally take an oath before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act. And it shall be the duty of said commissioners, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments; duplicates of which said appraisement shall be reduced to writing, and signed by said commissioners, or a majority of them; one copy shall be delivered to the applicant, and the other to the president, or any director or officer of said association or corporation, on demand; and in case any damage shall be adjudged to said applicant, the association or corporation shall pay the amount thereof, with costs
167 of said appraisal, said costs to be liquidated and ascertained in said award, and said commissioners shall receive for their services two dollars for each day they are actually employed in making said appraisement.

Sec. 7. Any person who shall unlawfully and intentionally injure, molest or destroy any of said lines, posts, piers or abutments, or the materials or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the Court before which the conviction shall be had.

Sec. 8. It shall be lawful for any association of persons organized under this act, by their articles of association, to provide for an increase of their capital, and of the number of the association.

Sec. 9. Any association or company now organized and using Morse's telegraph may organize as a corporation under this act on filing in the office of the secretary of state a resolution of its board of directors, signed and certified by the officers of the company, of its desire so to organize, and upon publishing notices to this effect in some one newspaper in the city of

New York, and the city of Buffalo, and the city of Albany, three months previous to such organization, provided that two-fifths of the owner* of the stock of said company or association do not dissent therefrom; provided that any stock or shareholder in any such association or company may, on giving thirty days' notice to the officers, or any of them, of such association or company, at any time before such organization, refuse to go into such organization, and thereupon such stock or shareholder shall be entitled to receive from such association or company, the full value of his shares or stock in such association or company.

Sec. 10. The stockholders of every association organized in pursuance of this act shall be jointly and severally personally liable for the payment of all debts and demands against such association, which shall be contracted or which shall be or shall become due during the time of their holding such stock; but such liability of any stockholder shall not exceed twenty-five per cent. in amount, the amount of stock held by him, and no stockholder shall be proceeded against for the collection of any debt or demand against such association, until judgment thereon shall have been obtained against the association, and an execution on such judgment shall have been returned unsatisfied in whole or in part, or unless such association shall be dissolved.

168

Sec. 11. It shall be the duty of the owner or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch.

Sec. 12. It shall likewise be the duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons

*So in original.

whose dispatch is postponed out of its order, as herein prescribed; provided, however, that arrangements may be made with the proprietors or publishers of newspapers, for the transmission for the purpose of publication of intelligence of general and public interest, out of its regular order.

Sec. 13. This act shall take effect immediately.

Chap. 98.

An Act to Amend an Act, Entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies, passed April twelfth, one thousand eight hundred and forty-eight.

Passed April 8, 1851.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The directors or trustees of any telegraph company formed or incorporated under the act entitled "An act to provide for the Incorporation and Regulation of
169 Telegraph Companies," passed April twelfth, one thousand eight hundred and forty-eight, may, at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, extend their line of telegraph, or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company.

Sec. 2. This act shall take effect immediately.

Chap. 471.

An Act to Amend an Act, Entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," passed April twelfth, one thousand eight hundred and forty-eight.

Passed June 29, 1853.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Any number of persons may associate, for the purpose of owning or constructing, using and maintaining, a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions, and subject to the liabilities prescribed in the act passed April twelfth, one thousand eight hundred and forty-eight, entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies." And such association shall, upon complying with the provisions of said act, become a body corporate, and shall have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of its board of directors to organize under this act; which said certificate shall contain the
170 specifications required by the said recited act, and shall be proved or acknowledged, and recorded in the manner therein prescribed.

Sec. 2. Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this State, subject to the restrictions in the said recited act contained; and also to erect and construct such fixtures upon, through or over any other land, subject to the right of the owner or owners thereof to full compensation for the same; and if any such association cannot agree with the owner or owners of any land taken or used by such association for the compensation to be paid therefor, it shall and may be lawful for such association, or such owner or owners to apply to the County Court of the county in which such lands are, by petition, stating the facts in relation thereto; and after the expiration of twenty-one days from the filing of such petition, and notice thereof given to such association, or to the owner or owners of such land, as the case may be, it shall be the duty of the said Court to appoint five disinterested

persons to make a just and equitable assessment and appraisal, in the manner directed by the said recited act of the loss or damage, if any, which may have been, or is likely to be, sustained by the owner or owners of such land, taken or used as aforesaid, whilst such land shall have been, or shall continue to be used as aforesaid. And such assessment and appraisal shall determine the annual rent or compensation to be paid by such association for such use, or in lieu thereof, a sum in gross, as the compensation for allowing the fixtures belonging to such association permanently to continue, and the same to be repaired, improved and renewed, or removed from time to time, as such association may require.

Sec. 3. Every such company, owning or using a line of electric telegraph, partly within and partly beyond the limits of this State, shall render to the proper officer a true report of the cost to such company of their works within this State; and the stock of such company in amount equal to such cost, or the dividends thereof, shall be subject to taxation in the same manner, and at the same rate, as the stocks or dividends of other companies incorporated by the laws of this State are subject.

171 Sec. 4. The liability of any share or stockholder in any company organized under this act, as provided for in the act of which this is an amendment, shall only apply to the amount due by any such share or stockholder in such company, and unpaid, on or for any such share or stock.

Chap. 559.

An Act to Amend an Act, passed April twelfth, eighteen hundred and forty-eight, to Provide for the Incorporation and Regulation of Telegraph Companies.

Passed April 19, 1855.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The eleventh section of the act passed April twelve, eighteen hundred and forty-eight, to provide for the in-

corporation and regulation of telegraph companies, is amended so as to read as follows:

Sec. 11. It shall be the duty of the owner, or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch; provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association, owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent.

Sec. 2. This act shall take effect immediately.

172 Chap 97.

An Act to Change the Name of the New York and Mississippi Valley Printing Telegraph Company.

Passed April 4, 1856.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The name of "The New York and Mississippi Valley Printing Telegraph Company," a body corporate, organized under the general laws of this State, is hereby changed to the "Western Union Telegraph Company;" and the said company shall have the right to continue to hold and manage the property and affairs of the said telegraph company, as a corporation, by or under the name and style of "The Western Union Telegraph Company." But nothing herein shall be construed to affect any action now pending in favor of or

against said company; and in case any action shall be hereafter commenced against the said company, in this State or elsewhere, by any person or party not knowing the change of the corporate name of said company, it shall not be authorized to plead a misnomer, but shall answer or plead to the merits of the action, stating in such answer the true name of said corporation; and such action shall proceed against it in either name, according to the practice of the Court in which such action shall be pending; and any judgment recovered therein shall be as valid as if the action had been commenced and conducted against the said company by its true name.

Sec. 2. This act shall take effect immediately.

Chap. 425.

An Act Further to Amend the Act Entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," passed April twelfth, eighteen hundred and forty-eight.

Passed April 22, 1862; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Any telegraph company which is duly incorporated under and in pursuance of the act entitled "An Act to provide for the Incorporation and Regulation of
173 Telegraph Companies," passed April twelfth, eighteen hundred and forty-eight, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the con-

struction, using, maintaining, owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this act.

Sec. 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall own or hold any interest in such line or lines, or shall become lessee of any such line or lines, such company, within one year after constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or after acquiring any other interest in such line or lines, shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section Two of the act hereby amended; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in sub-division five of the second section above mentioned.

Sec. 3. Any telegraph company incorporated as mentioned in the first section of this act, which before the passing of this act shall have purchased, constructed or leased, or shall have joined with any other corporation or association in the purchase, construction or leasing, or shall have become the owner or holder of any interest in any line or lines of telegraph not described in their original certificate of organization, may, within one year after the passage of this act, make
174 and file in the office of the secretary of state such certificate as is provided in the second section of this act, and upon the filing of such certificate, their act, if otherwise within the provisions of this statute, shall be as valid and effectual as if done after the passing of this act, saving all existing rights of other persons.

Sec. 4. This act shall take effect immediately.

Chap. 568.

An Act in Relation to Telegraph Companies.

Passed May 2, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. In order to perfect and extend the connections of telegraph companies in this State, and promote their union with the telegraph systems of other States, any telegraph company organized under the laws of this State may lease, sell or convey its property, rights, privileges and franchises, or any interest therein, or any part thereof to any telegraph company organized under, or created by, the laws of this or any other State, and may acquire by lease, purchase or conveyance the property, rights, privileges and franchises, or any interest therein, or any part thereof, of any telegraph company organized under, or created by, the laws of this or any other State, and may make payments therefor in its own stock, money or property, or receive payment therefor in the stock, money or property of the corporation to which the same may be sold, leased or conveyed; provided, however, that no such purchase, sale, lease or conveyance by any corporation of this State shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and also by the consent thereto in writing, or by vote, at a general meeting, duly called for the purpose, of three-fifths in interest of the stockholders in such company, present or represented by proxy, at such meeting.

Sec. 2. This act shall take effect immediately.

175 State of New York,
Office of the Secretary of State, ss.

I have compared the preceding with the original laws on file in this office, and do hereby certify that the same are correct transcripts therefrom, and of the whole of said original laws.

Given under my hand and the great seal of the State, at the

city of Albany, this first day of June, in the year one thousand nine hundred and twelve.

(Signed) EDWARD LAZANSKY,
Secretary of State.

[Seal]

176 New York and Mississippi Valley Printing Telegraph Company.

Articles of Association and Incorporation.

Preamble:

Whereas, Sanford J. Smith and Isaac Butts, under and by virtue of a contract between them of the one part, and Freeman M. Edson and Samuel L. Selden of the other part, are entitled to the exclusive right of establishing and constructing a line of telegraph to be operated by the instrument known and patented under the name of "House's Printing Telegraph," between Buffalo, in the State of New York, and St. Louis, in the State of Missouri; and,

Whereas. The said Sanford J. Smith and Isaac Butts are now engaged in constructing a line of telegraph between the places and for the purpose above mentioned,

Now, therefore, for the purpose of completing, owning and operating said telegraph line, the subscribers hereto have agreed and do hereby agree to form an incorporated association or company, pursuant to the act of the Legislature of the State of New York, entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies," passed April 12, 1848, upon the terms and conditions following, to-wit:

Name:

Art. 1. The name of the said company shall be "The New York and Mississippi Valley Printing Telegraph Company."

Route:

Art. 2. The route of the said telegraph line shall pass through this State, from the city of Buffalo to the State of Pennsylvania, along the south side of Lake Erie.

Route, Extent of:

Art. 3. This Company shall own and operate the residue of the said telegraph line from the boundary of the State of New York through the several States, to the city of St. Louis, touching at Cleveland, Columbus and Cincinnati, and thence to St. Louis by such route as shall be designated by the directors, to be constructed by the said Sanford J. Smith and Isaac Butts, under and by virtue of authority from the said States respectively, or from the persons whose lands the said line may cross.

177 Capital Stock:

Art. 4. The capital stock of said Company shall be three hundred and sixty thousand dollars, to be divided into three thousand six hundred shares of one hundred dollars each, but the amount of said stock may be increased in the manner hereinafter prescribed.

Shareholders, Names of:

Art. 5. The persons whose names are hereto subscribed are the shareholders of said capital stock, and their places of residence and the number of shares held by each are set opposite to their names respectively.

Corporation, Duration of:

Art. 6. This Company shall commence on the first day of April, eighteen hundred and fifty-one, and terminate on the first day of April, nineteen hundred and fifty-one.

Rights, Definition of:

Art. 7. This Company is to have exclusive right, subject to the rights of the aforesaid Smith and Butts, of constructing and using said printing telegraph upon the line aforesaid, under letters-patent issued to Royal E. House, as the inventor thereof, during the life of said patent, and of any renewals thereof, and the right of constructing and using House's insulators and of all improvements made or to be made by said Royal E. House in the printing telegraph or in the apparatus or machinery connected therewith.

Assent of Patentees to be Obtained:

The assent of the patentees to these articles is to be obtained and properly attested prior to the payment of any part of the subscriptions to the stock. As soon as practicable after twenty-five per cent of the cost of building said line shall have been paid by the subscribers to the said stock, the rights above specified shall be transferred to the Company by deed or other good and sufficient conveyance.

Patentee's Interest:

Art. 8. The one-half of said capital stock, to-wit, one hundred and eighty thousand dollars—shall be appropriated in payment for the exclusive right of constructing and using said printing telegraph upon the line aforesaid, under the letters-patent issued to Royal E. House as the inventor thereof, during the life of said patent, and of any renewals thereof; the other half shall be devoted to the object of constructing, completing and putting in operation the said line.

Contractors:

Art. 9. The line is to be constructed by Sanford J. Smith and Isaac Butts, above named, who are to receive therefor the sum of one hundred and eighty thou-
178 sand dollars, to be paid to them out of the moneys subscribed to the capital stock of said Company; and provided the full amount shall not be realized from subscription, they shall be entitled to receive, and shall accept the balance in stock.

Directors, Their Powers and Duties.

Art. 10. The affairs of this Company shall be managed by a board of nineteen directors, who shall choose a president and vice-president from their number, the board shall also have power to appoint a treasurer and secretary, who shall hold their offices respectively during the pleasure of the board, or they may appoint one person to act both as secretary and treasurer.

Salaries—Quorum:

They shall have power to fix the salaries of the presi-

dent and of all the other officers and agents of the company, and to adopt such resolutions and by-laws not conflicting with any provisions of these articles, as they may think proper for the regulation of the business of the Company. A majority of the directors, including the president or vice-president, shall constitute a quorum to do business. Special meetings of the board may be called by the president as often as occasion may require.

Meetings of Directors:

They shall hold regular quarterly meetings on the third Tuesdays of January, April, July and October, respectively, of each year, and may declare dividends at such meetings, or as often as they may deem expedient.

Executive Committee:

They may also designate three of their number who, with the president and treasurer, shall constitute an executive committe, who shall, for the time being, have charge of the affairs and business of the Company, subject to the control of the board.

Directors, Election of:

Art. 11. The directors shall be chosen by the stockholders at their annual meeting, and shall hold their offices for one year, and until others are chosen.

Qualifications of:

No person shall be director, unless he is a stockholder in the Company. Any vacancy in the board of directors may be filled for the residue of the year by the remaining directors.

The stockholders shall, at the same time, choose three persons to act as inspectors, to preside at the next succeeding annual election.

Until the first annual election of directors, or until other persons are appointed in their places, as hereinafter provided, the following persons shall compose the board of directors, to-wit:

Directors, Names of:

Henry S. Potter, Addison Gardiner, Freeman Clark,

Isaac R. Elwood, George W. Burbank, Joseph Hall, George H. Mumford, E. Darwin Smith, Isaac Hills,
179 Samuel Medary, Joseph Medbery, James Chappel, Rufus Keeler, Royal E. House, Freeman M. Edson, Samuel H. Selden, Isaac Butts, Sanford J. Smith and Hiram Sibley.

In case any of the aforesaid persons shall not become stockholders of this Company within sixty days from the organization thereof, they shall cease to be directors, and the remaining directors may supply the vacancy until the said election.

President and Vice-President, Their Powers and Duties:

Art. 12. The president shall preside at all meetings of the directors, and also of the stockholders except during the election of directors. He shall draw all drafts upon the treasury for the disbursements of the Company, according to the rules prescribed by the board. He shall sign all certificates of stock and shall be ex-officio president of the executive committee. In the absence or inability of the president, the vice-president shall act in his stead, and possess all the powers and perform all the duties of the president.

Secretary, Duties of:

Art. 13. The secretary shall keep the minutes of the proceedings of all the meetings of stockholders, and of the directors, and of the executive committee, which, at all reasonable hours, shall be open to the inspection of any stockholders; he shall countersign all certificates of stock; he shall keep the general accounts of the Company, as well as a record of all issues and transfers of stock; and shall perform all such other duties as may be imposed upon him by resolutions, or by-laws adopted by the board of directors.,

Treasurer, Duties of—To Give Security:

Art. 14. The treasurer shall receive all moneys collected, pay all drafts and dividends made pursuant to the rules and regulations of the board of directors, and shall keep a faithful account of his receipts and disbursements; and at each quarterly meeting of the directors, and oftener

if required, he shall exhibit to them a true transcript thereof. He shall also, when required, give security to the Company, in such form and to such amount as the board of directors may prescribe, for the faithful discharge of his duties.

While the line is in progress of construction, the treasurer shall also receive and have the custody of the moneys subscribed for building said line, which subscriptions shall be payable to his order; and he shall pay to the said
180 Sanford J. Smith and Isaac Butts the moneys so received by him, under the direction of the executive committee, as fast as the same shall be required for the construction of the said line; but the amount so to be paid shall not, at any time, exceed the value of the work actually done, and materials delivered or procured; which materials so delivered or procured shall thereupon become and be the property of the Company.

Contractors to Give Security:

The Board of directors or executive committee may exact from the said Smith and Butts adequate security for the faithful appropriation of all moneys paid to them for the purposes herein specified.

Line, Specifications in Regard to Construction of:

Art. 15. The said Sanford J. Smith and Isaac Butts are to construct said line from the City of Buffalo to the City of St. Louis, according to the contract hereinbefore mentioned, in the manner following, viz.:

There shall be at least thirty posts to the mile, which shall be not less than thirty feet long; they shall also be twenty-seven inches or more in circumference, four and a half feet from the butt, and twelve inches in circumference at the top, and they shall be set into the ground five feet. The posts shall be of the best timber—reference being had to durability—which is readily accessible on the route through which the line is to pass.

Upon these posts shall be stretched two conductors of single iron wire of the best quality, one of which shall weigh not less than six hundred pounds, and the other not less than four hundred and fifty pounds to the mile.

The insulation used for the upper wire shall be that

recently invented by the said Royal E. House, consisting of a heavy glass insulator, cast or moulded, with a screw to secure it at the top of the pole, and inclosed in a cast-iron cap, to which it is also secured with a screw; the side insulator shall be such as shall be approved by the said House.

One of House's printing telegraph instruments is to be furnished by said Smith and Butts for each of the following places, to-wit: Erie, Cleveland, Columbus, Dayton, Indianapolis, Terre Haute, Louisville; and two each at Buffalo, Cincinnati and St. Louis—provided the line shall intersect each of these places. But in no case shall the number of telegraph instruments be less than that
181 herein specified; provided that so many be required at those and other places, upon the completion of the line.

Suitable offices shall be procured at the several stations on the line in which the machine shall be set set up in a proper manner for use; but the rent and all expenses of fitting up said offices, except furnishing and setting up the instruments, and connecting them properly with the line, shall be borne by the Company.

The whole line is to be put in complete working order by the said Smith and Butts, according to the aforesaid contract.

Script Certificate:

Art. 16. Whenever the first payment on stock is made, the treasurer shall give a script certificate of stock, stating the amount of each share, the number of shares which the holder thereof is entitled to, the amount paid thereon, and that the same is only transferable on the books of the Company, and on the surrender of such certificate.

Patentee's Stock, When It May Be Issued:

Art. 15. The board of directors shall not be authorized to issue the portion of the stock which is appropriated to be paid or given for the rights specified in Article Seven, until such rights are fully transferred, conveyed or assigned to this Company, in such manner as to vest

the same in this Company, according to the true intent and meaning of said article.

Line and All Materials to Be the Property of the Corporation—Members of Association to Execute Conveyance:

Art. 17. Every part and portion of the aforesaid telegraph line, as fast as the same shall be constructed, together with all posts, wires, insulators or other materials procured for said line, shall become and be the full and complete property of this Company, and every member of this Company shall be bound to execute to the corporation such conveyance and assignment as shall be necessary to vest the said corporation with all the rights of property aforesaid, and all the rights of constructing and using on the said line the aforesaid printing telegraph and insulators, and all improvements thereof, and all renewals of the same, as specified in the aforesaid Seventh Article.

Annual Meeting:

Art. 18. The first annual meeting of the stockholders shall be held at the Mansion House, in the City of Buffalo, on the first Tuesday of April, in the year 1852, or at some earlier day, to be appointed by the executive committee, in case the line shall be in working order through its entire length, prior to January 1, 1852, of which earlier meeting, the same notice is to be given as for a special
182 meeting of the stockholders. The subsequent annual meetings shall be held on the same day in each year.

Special Meetings, How Called:

Art. 19. Special meetings of the stockholders shall be called by the president at any time, on the written request of the persons holding, or entitled to, one-third of the capital stock of this Company. Such request shall specifically state the object or objects of the desired meeting. The president shall appoint such meeting and the secretary shall give written notice thereof, stating the object of the proposed meeting, which notices shall be sent by mail, at least thirty days prior to the time of such meeting, addressed to the several stockholders, at their respective places of residence, as they appear on the

books of the Company; but no such meeting shall be held to be irregular or invalid, for want of due notice to all the stockholders, unless the omission to give such notice was willful and fraudulent.

Line May Be Merged With Other Lines.

Art. 20. The board of directors, with the consent of two-thirds of all the members thereof, whose names are to be entered in the minutes of their proceedings, may merge or unite this line with any other telegraph line or lines which may be authorized to use House's printing telegraph, on such terms as shall appear just and equitable; and the stockholders in this Company shall be entitled to at least the same amount of stock in the said incorporated Company, to which this Company shall be united, as they were respectively entitled to in this Company.

Directors May Purchase Other Lines.

The said directors with the like consent may also purchase for the Company any line or part of a line of telegraph already constructed, to form a part of this line, if, in their judgment, such purchase will be for the benefit of this Company. And in case of any such purchase or purchases, so much of the cost thereof as would be equal to the cost of the same extent of new structure, shall be borne by the said Sanford J. Smith and Isaac Butts, and the balance, if any, shall be chargeable to the association.

Or Lease Them:

The said directors may also lease for the Company, any line or part of a line of telegraph, if in their judgment such leasing will be for the benefit of this Company.

Inspection and Acceptance of Line:

Art. 21. Whenever the president shall receive notice from the said Sanford J. Smith and Isaac Butts that the line from the City of Buffalo to the City of St. Louis is completed and ready for operation, he shall call a meeting of the directors, for the purpose of taking such meas-
183 ures in relation to the inspection of the said line and the acceptance thereof by this Company, as they may deem advisable, in the proceedings of which meeting

neither the said Sanford J. Smith nor Isaac Butts shall have any voice. Or, the directors, at their option, may at any time accept any portion or section of such line as may be in working order. And from the date of such acceptance, such portion or section of line shall be operated by and for the benefit of the corporation; and all liability of said Smith and Butts, as regards any particular section or portion of line, shall be terminated by the acceptance thereof, as herein provided for. But, with the restrictions here specified, the said Sanford J. Smith and Isaac Butts shall be liable for all defects and deficiencies of said line, until it is duly accepted by the directors.

Subscriptions, How Payable:

Art. 22. The subscriptions to this stock shall be payable in four installments of twenty-five per cent each. The first installment shall be payable on demand, or within thirty days thereafter. The others shall be payable at the call of the executive committee; and the treasurer shall give a written notice of such call, which shall be deposited in the post-office, at least thirty days prior to the time of payment, and addressed to the several stockholders, at their respective places of residence, as they appear on the books of the Company.

Stock, How Forfeited:

In case any subscriber shall fail to pay the amount thus called for at the time specified in such notice, he shall forfeit his stock and all previous payments thereon, or remain liable on his subscription, at the option of the board of directors; all payments to be made to the treasurer of the Company, or to his order, for the benefit of this Company.

Directors May Be Increased or Decreased:

Art. 23. Whenever the persons holding one-fourth of the stock shall present a written request to the president for an increase or decrease of the number of directors, at least two months before the annual meeting of the stockholders, he shall direct the secretary to give thirty days' notice through the post-office, to each stockholder, that the question of an increase or decrease of the number of directors will be presented at such annual meeting, at

which time the number of directors may be increased or decreased by a majority of the votes given thereon, but the number shall not at any time be less than that fixed by these articles.

Number of Wires May Be Increased, or the Line Extended:

184 Art. 24. Whenever the board of directors, by the vote of a majority of all the members thereof, shall determine that it is for the interest of the Company to extend its business by adding to the number of wires or conductors upon the line aforesaid, or by constructing any other line or lines to operate in connection therewith (in case the patent rights can be obtained from the proprietors thereof), they shall enter their determination upon their minutes at large; and all such additions shall be made by an increase of the capital stock, and in no other manner. The board shall fix the amount of increase necessary for the purpose aforesaid. They shall cause thirty days' notice to be sent by mail, addressed to each of the stockholders at his place of residence, of a meeting of the stockholders, at which the question of increasing the stock, specifying the object thereof, is to be submitted. If at such meeting the persons owning two-thirds of the stock shall vote in favor of such increase, or if, within two months thereafter, the persons owning two-thirds of said stock shall give a written assent thereto, the directors shall be authorized to increase the stock accordingly. No meeting shall be held irregular or invalid for want of due notice to all the stockholders, unless the omission to give such notice was willful and fraudulent.

By-Laws—Stock to Be Distributed:

Art. 25. These articles shall be, and form, a part of the by-laws and regulations of this corporation, until the same shall be altered as herein provided. And the said directors shall provide for the distribution of the capital stock of the said corporate body among the persons entitled thereto in proportion to their respective rights and shares therein.

Residence of stockholders:

Art. 26. Every person subscribing to these articles shall designate his place of residence, and every person becoming the assignee of any stock or share shall in like manner designate the place of his residence, to which places all notices required by these articles may be sent.

Vote of Stockholders—Proxy.

Art. 27. At all meetings of the stockholders, each stockholder shall be entitled to one vote on each share of stock appearing by the books of this Company to have belonged to him for at least thirty days prior to such meeting; but no one stockholder shall give more than one-fourth part of the aggregate vote of the Company. Any stockholder may vote either in person or by proxy.

185 All Stockholders Deemed to Assent to These Articles:

Art. 28. Every person who shall take stock in this Company by subscription, transfer, or otherwise, shall be deemed to assent to the foregoing articles; but the same may be altered at any annual meeting of the stockholders, by the vote of the persons holding a majority of the stock, except the article in relation to the increase of stock, which shall not be altered without the vote of the persons holding two-thirds of the said capital stock; and excepting also all those articles which embrace some matter of contract between the Company and the patentees or contractors for building the line, which last articles shall be and remain unalterable, without the consent of each and every party thereto.

Patentee's Stock, How Distributed:

Art. 29. The board of directors shall cause certificates of the stock of this Company to be issued to the several parties entitled thereto, in proportion to their respective rights, and for the purpose of enabling them to do so, duplicate copies of all contracts, by virtue of which any person shall be entitled to any of the said stock, shall be filed with this Company. But the portion of stock representing the patentee interest shall be issued to Samuel L.

Selden and Freeman M. Edson in trust, to be by them distributed to the respective parties entitled thereto.

Correction: (For George W. Burbank, in the list of directors, read Gideon W. Burbank.)

We, the undersigned, do hereby severally agree to take and pay for the number of shares in the capital stock of "The New York and Mississippi Valley Printing Telegraph Company," set opposite to our names respectively, upon the terms and conditions in the preceding articles of association, specified and set forth April 1st, 1851:

Subscriber's Name.	Residence.	No. of Shares.
186 The New York and Mississippi Valley Printing Telegraph Company.		

We, whose names and seals are hereunto affixed, do certify as follows:

First. That we have formed a company for telegraphic purposes, with a view to an incorporation under the act of the Legislature of the State of New York, entitled "An Act to provide for the Incorporation of Telegraph Companies," passed April 12, 1848.

Second. That the name by which the said Company is to be distinguished, and which is to be used in carrying on its operations is "The New York and Mississippi Valley Printing Telegraph Company."

Third. That the object of said Company is to construct and use a line of telegraph communication from the City of Buffalo, along the south side of Lake Erie, to the State of Pennsylvania, with the right, subject to the laws of the several States which it may intersect, to construct, own and operate a line of telegraph extending from the Western terminus of the line above described, through the intermediate States, to the City of St. Louis, in the State of Missouri, touching at Cleveland, Columbus, Cincinnati and such other points as may be deemed advisable.

Fourth. That the capital stock of said Company is three hundred and sixty thousand dollars, to be divided into thirty-six hundred shares of one hundred dollars each, with power to increase the same in the manner prescribed in the articles of association and incorporation hereto attached.

Fifth. That the names and places of residence of the shareholders, and the number of shares held by each respectively, are as follows:

Samuel L. Selden, of Rochester, New York, nine hundred shares.

Freeman M. Edson, of Rochester, New York, nine hundred shares.

Isaac Butts, of Rochester, New York, nine hun-
187 dred shares.

Sanford J. Smith, of St. Louis, Missouri, nine hundred shares.

Making the aggregate of thirty-six hundred shares.

Sixth. That the Company shall commence on the first day of April, eighteen hundred and fifty-one, and shall terminate on the first day of April, nineteen hundred and fifty-one.

Seventh. That the affairs of the Company are to be managed under and according to the annexed articles of association.

In witness whereof we have hereunto set our hands and seals on the day of the year first above written.

SAM'L L. SELDEN. [L. S.]
F. M. EDSON. [L. S.]
ISAAC BUTTS. [L. S.]
SANFORD J. SMITH. [L. S.]

State of New York,
Monroe County, ss.

On this second day of April, 1851, before me, the subscriber, came Samuel L. Selden, Freeman M. Edson, Isaac Butts and Sanford J. Smith, to me known to be the persons described in and who executed the foregoing certificate, and severally acknowledged that they executed the same.

A. E. PARDEE,
Comr. of Deeds.

Certificate of a Resolution adopted under and by virtue of an Act of the Legislature of the State of New-York, entitled, "An Act to amend an Act entitled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' "— being chapter 471, of the laws of 1853, by a majority of the Board of Directors of The New-York and Mississippi Valley Printing Telegraph Company, or association owning and using a telegraph line partly within this State.

188 At a meeting of the Board of Directors of the New-York and Mississippi Valley Printing Telegraph Company, duly convened, held at the office of the Secretary of said Company, in the City of Rochester, in the State of New York, on the twentieth day of January, 1854:

Resolved by this Board, that The New-York and Mississippi Valley Printing Telegraph Company, now owning and using, and having owned and used on the 29th day of June, 1853, and long prior thereto, and ever since, a line of wires of telegraph, or a telegraph line, partly within the State of New York, and partly within the States of Pennsylvania, Ohio and Kentucky, that is to say, from a point in the City of Buffalo, in the State of New York, to the City of Louisville, in the State of Kentucky, passing through Dunkirk, in the State of New York, through Erie, in the State of Pennsylvania, through Cleveland, Columbus, Dayton and Cincinnati, in the State of Ohio, through Covington, Georgetown and Frankfort, in the State of Kentucky, to the City of Louisville aforesaid (and to include a branch circuit to Lexington, in said State of Kentucky, to be completed), shall organize under the act of the Legislature of the State of New-York, passed June 29, 1853, entitled "An Act to amend an Act entitled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' " passed April 12, 1848, in order that the said Company may become a body corporate, and be entitled to the benefit of the provisions in the said amendatory act contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of this Board of Directors to organize under the said last mentioned act.

And thereupon, be it further

Resolved, as follows:

First. That the name assumed to distinguish the said Company and to be used in its dealings, and by which it may sue and be sued, is to be and is—"The New-York and Mississippi Valley Printing Telegraph Company."

Second. That the general route of the said line of telegraph is from a point in the City of Buffalo, in the State of New-York, to the City of Louisville, in the State of Kentucky, passing through Dunkirk, in the State of New-York, through Erie, in the State of Pennsylvania, through Cleveland, Columbus, Dayton and Cincinnati, in the State
189 of Ohio, and through Covington, Georgetown and Frankfort, in the State of Kentucky, to the City of Louisville aforesaid (including a branch circuit to Lexington, in the last mentioned State), which several places above mentioned are indicated as the points to be connected thereby.

Third. That the capital stock of said Company is to be and is one hundred and seventy thousand dollars, divided into seventeen hundred shares, of one hundred dollars each share.

Fourth. That the following list exhibits the names and residence of the shareholders of the capital stock aforesaid, and the number of shares held by each of them respectively.

Names of Shareholders.	Residences.	No. of Shares.
J. L. Allen	New Haven, Conn	11
A. Arnold		4
William Alling	Rochester, N. Y	30
Bacon & Co	Do.	47
Isaac Butts	Do.	55
Wm. Buffam	Stratford, Conn	11
G. W. Burbank	Rochester, N. Y	15
C. G. Brinsmade	Do.	1
Jas. Chappel	Do.	10
Freeman Clarke	Do.	75
Dows & Carey	New-York City	20
F. M. Edson	Flushing, N. Y	30
J. R. Elwood	Rochester	250
A. Gardiner	Do.	75
F. G. Jewett	Skaneateles, N. Y	75
Cam. Livingston	New-York City	41

G. H. Mumford	Rochester, N. Y.		75
J. Medbery	Do.		75
J. F. Morris	New York City		74
H. S. Potter	Rochester, N. Y.		125
W. H. Perkins	Do.		4
J. B. Richards	New York City		40
R. W. Russell	Do.		36
E. F. Smith	Rochester, N. Y.		4
A. Sampson	Do.		30
H. Sibley	Do.		114
S. L. Selden	Rochester, N. Y.		55
190 J. B. Stillson	Do.		30
E. P. Willis	Do.		30
			1,442

The remaining 258 shares is to be issued to Isaac Butts on the payment of $1,200 to this Company, and is to be delivered to him on his procuring a re-lease from the contractors for constructing the line, and from persons claiming under them by assignment, or by guaranteeing, with satisfactory security, the said Telegraph Company against all claims from said contractors and those claiming under them as aforesaid, or by any other proceeding by which such claims should be effectually barred.

Fifth. That the present directors of the said Company, and all the officers thereof, shall remain and continue to act as such directors and officers of the new Company organized under this resolution, until others are duly elected or appointed in their places respectively.

Sixth. That said Company shall and doth commence as a body corporate this twentieth day of January, 1854, and shall terminate on the first day of April, one thousand nine hundred and fifty-one.

And be it further

Resolved, That the above resolutions having been adopted by a majority of the said board of directors, a certificate thereof in due form shall be proved or acknowledged and filed and recorded according to the requirements of the said act, passed June 29, 1853, entitled "An Act to amend an Act en-

titled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,'" passed April 12, 1848.

This certifies that the foregoing are true and correct copies of resolutions passed or adopted by a majority of the board of directors of the New-York and Mississippi Valley Printing Telegraph Company, at a meeting held at the office of the secretary of the said Company, the twentieth day of January, 1854.

In witness whereof, the president and secretary of
191 said Company have hereunto subscribed their names, and caused the seal of the said Company to be hereunto affixed the day and year last above written.

[L. S.] HENRY S. POTTER, President.
ISAAC R. ELWOOD, Sec'y.

We, the undersigned, being a majority of all the directors of the aforesaid New-York and Mississippi Valley Printing Telegraph Company, do certify, that at a meeting of the said board, duly convened, held at the office of the secretary of the said Company in the City of Rochester, on the twentieth day of January, 1854, the foregoing resolutions were adopted by a majority of the aforesaid board of directors, and that the above specifications in said resolutions contained, that is:

1. Of the name assumed to distinguish the Company and to be used in its dealings, and by which it may sue and be sued.

2. Of the general route of the telegraph line owned and used by said Company, designating the points to be connected.

3. Of the capital stock of said Company and of the number of shares into which such stock is and shall be divided.

4. Of the names and places of residence of the shareholders and the number of shares held by each of them respectively, and

5. Of the period at which said Company shall commence and terminate.

Are in all respects full, true and correct.

In witness whereof, we have, pursuant to the statute in such

case made and provided, made this certificate under our hands and seals, at the City of Rochester, in the County of Monroe, and State of New York, this twentieth day of January, in the year of our Lord, one thousand eight hundred and fifty-four.

HENRY S. POTTER.	[L. S.]
ISAAC R. ELWOOD.	[L. S.]
F. CLARKE.	[L. S.]
HIRAM SIBLEY.	[L. S.]
ISAAC BUTTS.	[L. S.]
W. H. CHENEY.	[L. S.]
J. MEDBERY.	[L. S.]
J. B. STILLSON.	[L. S.]
E. P. WILLIS.	[L. S.]
WM. ALLING.	[L. S.]

192 City of Rochester,
In Monroe County.

On the twentieth day of January, 1854, personally before me, the subscriber, appeared Henry S. Potter, Isaac R. Elwood, Freeman Clarke, Hiram Sibley, Isaac Butts, William H. Cheney, Joseph Medbery, Jerome B. Stillson, Edmund P. Willis and William Alling, known to me to be the persons described in and who executed the foregoing certificate, and severally, each for himself, acknowledged that he had executed the said certificate for the purposes therein mentioned, and the said Henry S. Potter also acknowledged that he executed the foregoing official certificate, as and being president of the New-York and Mississippi Valley Printing Telegraph Company, and the said Isaac R. Elwood acknowledged that he executed the said last mentioned certificate, as and being the secretary of the said Company.

DANL. B. BEACH,
Commiss. of Deeds for Said City.

State of New York,
Monroe Co.
Clerk's Office, Rochester.

I certify that Danl. B. Beach, Esq., was, at the date of the certificate of proof or acknowledgment of the annexed instrument in writing, a commissioner of deeds for the City of Rochester, in said county, duly authorized to take the same; that I am well acquainted with his handwriting, and verily

believe that the signature to said certificate is genuine; and that the annexed instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county, this 7th day of Feb., A. D. 1854.

[L. S.] W. B. WILLIAMS, Clerk.

State of New York, 365 A
Office of the Secretary of State, ss.

I have compared the preceding with the original certificates of incorporation and organization of "The New-York and Mississippi Valley Printing Telegraph Company," with the acknowledgments thereto annexed, filed in this office, on the eighth day of April, 1851, and on the twenty-first day of February, 1854, respectively; and do hereby certify the same to be correct transcripts therefrom and of the whole of said original certificates.

Witness my hand and the seal of office of the secretary of state, at the City of Albany, this first day of June, one thousand nine hundred and twelve.

(Signed) JOSE E. PIDGEON,
(Seal) Second Deputy Secretary of State.

193 United States of America,
State of New York.

By
Edward Lazansky,
Secretary of State and Custodian of the Great Seal Thereof.

It is hereby certified that Jose E. Pidgeon was, on the day of the date of the annexed certificate, second deputy secretary of state of the State of New York, and duly authorized to grant the same; that the same is in due form, and executed by the proper officer; that the seal affixed to said certificate is the seal of the secretary of state of the State of New York; that the signature thereto of the said Jose E. Pidgeon, second deputy secretary of state, is in his own proper handwriting, and is genuine; and that full faith and credit may and ought to be given to his official acts.

In testimony whereof, the great seal of the State is hereunto affixed.

Witness my hand at the City of Albany, the first day of June, in the year of our Lord one thousand nine hundred and twelve. (Signed) EDWARD LAZANSKY,

(Seal) Secretary of State.

194 EXHIBIT MARKED "PLAINTIFF 2."

Filed August 1, 1912.

Certificate of Incorporation and Articles of Association of the New York and Mississippi Valley Printing Telegraph Co.

The People of the State of New York, by the Grace of God Free and Independent.

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know ye, that we, having examined the records and files in the office of the clerk of the County of Monroe, of the County Court of said county, and of the Supreme Court of said State in and for said county, do find there remaining on file or entered a certain certificate of incorporation and articles of association of the New York and Mississippi Valley Printing Telegraph Co., and the words and figures following, to-wit:

Note: Plaintiff's Exhibit 2 is the same as that embodied in Plaintiff's Exhibit 1, commencing at page 176 of this transcript, except that Plaintiff's Exhibit 2 differs from that of Plaintiff's Exhibit 1, in the following respects, to-wit:

Above the heading: "New York and Mississippi Valley Telegraph Company," in Plaintiff's Exhibit 2, is written with ink the following:

The New York and Mississippi Valley Printing Telegraph Company.

195 In Art. 6, in Plaintiff's Exhibit 2, "teen" of the word "eighteen" is erased with ink, and above the

word "eight" remaining, the words "one thousand" are inserted in ink; "teen" of the word "nineteen" is erased with ink, and inserted above the word "nine" remaining, are the words "one thousand" in ink.

In the notation containing the words "Directors may be increased or decreased," opposite Art. 23, the word "decreased" is erased by a line with ink drawn through it, and underneath is written with ink the word "diminished."

In the sixteenth line of Art. 24, in Plaintiff's Exhibit 2, the word "owning" is erased by an ink line drawn through it, and over said word is written with ink the word "holding."

In the fifth paragraph of Plaintiff's Exhibit 2, appearing in Plaintiff's Exhibit 1, copied at page 186 of this transcript, the words "of" appearing in the 3rd, 4th, 5th and 6th lines are erased by a black ink mark.

In the paragraph of Plaintiff's Exhibit 2, commencing with the words "Certificate of a Resolution," etc., and ending with the words "line partly within this State," copied at page 187 of Plaintiff's Exhibit 1, the following is written in the right-hand margin, opposite said paragraph in Plaintiff's Exhibit 2, with black ink, to-wit:

Monroe County, ss. Recorded on the 18" Sept., 1877, at 12 o'clock M. in Liber 6 of Miscellaneous Records, page 88, and examined. (Signed) E. A. Frost, Clk. Filed April 2nd. 1851.

The impress of the county seal of Monroe County is made in the left-hand margin opposite the paragraph beginning with the words "Certificate of Resolution," etc., in Plaintiff's Exhibit 2.

Then said Plaintiff's Exhibit 2 is concluded by the following:

And that the foregoing having been compared with said original, is a true and correct copy of said original on file as aforesaid and of the whole thereof.

All which we have caused by these presents to be exemplified, and hereunto set our hand and caused the seal of our said Supreme Court to be hereunto annexed.

196 Witness Hon. S. Nelson Sawyer, Justice of the Supreme Court of the State of New York (7th Judicial District), at the City of Rochester, in the County

of Monroe, in said State, the 14th day of May in the year of our Lord one thousand nine hundred and twelve.

(Signed) JAMES L. HOTCHKISS,
Clerk.

(Seal)

Supreme Court—Monroe County.

The New York and Mississippi Valley Printing Telegraph Company.

I, Hon. S. Nelson Sawyer, Justice of the Supreme Court of the State of New York (Seventh Judicial District), do hereby certify that James L. Hotchkiss, whose name is subscribed to the preceding exemplification, is the clerk of the said County of Monroe, and clerk of said Supreme Court for said county, duly elected and sworn, and that the signature of said clerk to said certificate is genuine, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form of law.

Dated at Rochester, N. Y., May 14th, 1912.

(Signed) S. NELSON SAWYER,
Justice of the Supreme Court of the State of New York (Seventh Judicial District).

State of New York,
County of Monroe, ss.
Monroe County Clerk's Office.

I, James L. Hotchkiss, the clerk of the Supreme Court in and for said county and State, the same being a court of record, do hereby certify that the Honorable S. Nelson Sawyer, who has signed the foregoing, is a presiding Justice of the Supreme Court, 7th Judicial District, in the City of Rochester, County of Monroe, and State of New York; that he is duly
197 commissioned and qualified and that I am well acquainted with his handwriting and verily believe his signature is genuine.

In witness whereof, I have hereunto set my hand and the official seal of said Court this 17th day of May, 1912.

(Signed) JAMES L. HOTCHKISS,
Clerk.

(Seal)

By C. H. JAMESON,
Deputy Clerk.

198 PLAINTIFF'S EXHIBIT 3.

Filed Aug. 1, 1912.

New York and Mississippi Valley Printing Telegraph Company.

Certificate of Incorporation.

Certificate of a resolution adopted under and by virtue of an act of the Legislature of the State of New York entitled "An Act to Amend an Act entitled, "An Act to provide for the incorporation and regulation of Telegraph Companies," being Chapter 471 of the Laws of 1833, by a majority of the board of directors of the New York & Mississippi Valley Printing Telegraph Company or association owning and using a telegraph line with this State.

At a meeting of the board of directors of the New York and Mississippi Valley Printing Telegraph Company duly convened, held at the office of the secretary of said Company in the City of Rochester in the State of New York, on the 20th day of January, 1854,

Resolved by this board, that the New York & Mississippi Valley Printing Telegraph Company now owning and using and having owned and used on the 29th day of June, 1853, and long prior thereto, and ever since, a line of wires of telegraph or a telegraph line partly within the States of New York, and partly within the States of Pennsylvania, Ohio and Kentucky, that is to say, from a point in the City of Buffalo, in the State of New York, to the City of Louisville, in the State of Kentucky, passing through Dunkirk, in the State of New York; through Erie, in the State of Pennsylvania; through Cleveland, Columbus, Dayton and Cincinnati, in the State of Ohio; through Covington, Georgetown and Frankfort, in the State of Kentucky, to the City of Louisville, aforesaid (and to include a branch circuit to Lexington, in said State of Kentucky, to be completed), shall organize under the act of the Legislature of the State of New York, passed June 29th, 1853, entitled "An Act to Amend an Act entitled An Act to provide for the incorporation and regulation of telegraph companies, passed April 12th, 1848, in order that the said Company may become a body corporate and be entitled to

the benefit of the provisions of the said amendatory act con-
on filing in the office of the secretary of state a cer-
199 tificate of a resolution adopted by the majority of this
board of directors to organize under the said last mentioned act.

And thereupon be it further resolved as follows:

First. That the name assumed to distinguish the said Company and to be used in its dealings and by which it may sue and be sued, is to be and is, "The New York & Mississippi Valley Printing Telegraph Company.

Second. That the general route of the said line of telegraph is from a point in the City of Buffalo in the State of New York to the City of Louisville, in the State of Kentucky, passing through Dunkirk, in the State of New York, through Erie, in the State of Pennsylvania, through Cleveland, Columbus, Dayton and Cincinnati, in the State of Ohio, and through Covington, Georgetwoen [Georgetown] and Frankfort, in the State of Kentucky, to the City of Louisville, aforesaid (including a branch circuit in Lexington, in the last mentioned State), which several places above mentioned are indicated as the points to be connected thereby.

Third. That the capital stock of said Company to be, and is, one hundred and seventy thousand dollars, divided into seventeen hundred shares, of one hundred dollars each share.

Fourth. That the following list exhibits the names and residences of the shareholders of the capital stock aforesaid, and the number of shares held by each of them respectively:

Name of Shareholders.	Residence.	No. of Shares.
J. A. Allen.....	New Haven, Conn.....	11
A. Arnold.....	.....	4
Wm. Alling.....	Rochester, N. Y.....	30
Bacon & Co.....	Do.	47
Isaac Butts.....	Do.	55
Wm. Buffum.....	Stratford, Conn.	11
G. W. Burbank.....	Rochester, N. Y.....	15
E. G. Brinsmaid.....	Do.	1
Jas. Chappell.....	Do.	10
Freeman Clarke.....	Do.	75

	Dawe & Carey...	New York City.....	20
200	F. M. Edson.....	Flushing, N. Y.....	30
	I. R. Elwood.....	Rochester, N. Y.....	250
A. Gardiner.....		Do.	75
F. G. Jewett.....		Skaneatles, N. Y.....	75
Corn Livingston.....		New York City.....	41
G. H. Mumford.....		Rochester, N. Y.....	75
J. Medbury.....		Do.	75
F. Morris.....		New York City.....	74
H. S. Potter.....		Rochester, N. Y.....	125
W. H. Perkins.....		Do.	4
J. B. Richards.....		New York City.....	40
R. W. Russel.....		Do.	36
E. F. Smith.....		Rochester, N. Y.....	4
A. Sampson.....		Do.	30
H. Sibley.....		Do.	114
H. L. Seldon.....		Do.	55
J. B. Stitson.....		Do.	30
E. P. Willis.....		Do.	30
			1442

The remaining 258 shares is to be issued to Isaac Butts on the payment of $1200.00 to this company, and is to be delivered to him on his procuring a release from the contractors for constructing the line, and from persons claiming under them by assignment or by guaranteeing with satisfactory security, the said Telegraph Company against all claims from said contractors, and those claiming under them as aforesaid, or by any other proceeding by which such claim should be effectually barred.

Fifth. That the present directors of the said company and all the officers thereof, shall remain and continue to act as such directors and officers of the new company organized under this resolution until others are duly elected or appointed in their places respectively.

201 Sixth. That said company shall and doth commence as a body corporate, this 20th day of January, 1854, and shall terminate on the 1st day of April, one thousand nine hundred and fifty-one.

And be it further resolved that the above resolutions have been adopted by a majority of the said board of directors, a certificate thereof in due form shall be proved or acknowledged, and filed and recorded according to the requirements of the said act, passed June 29, 1853, entitled, "An act to amend an act," an act to provide for the incorporation and regulation of telegraph companies, passed April 12, 1848.

This certifies that the foregoing are true and correct copies of resolutions passed or adopted by a majority of the board of directors of the New York & Mississippi Valley Printing Telegraph Company at a meeting held at the office of the secretary of the said company, the twentieth day of January, 1854.

In witness whereof, the president and secretary of said company have hereunto subscribed their names and caused the seal of the said company to be hereunto affixed the day and year last above written.

HENRY S. POTTER, [L. S.]
President.
ISAAC R. ELWOOD, [L. S.]
Secy.

We, the undersigned, being a majority of all the directors of the aforesaid, New York & Mississippi Valley Printing Telegraph Company, do certify that at a meeting of the said board, duly convened, held at the office of the secretary of the said company, in the City of Rochester, on the twentieth day of January, 1854, the foregoing resolutions were adopted by a majority of the aforesaid board of directors, that the above specifications in said resolutions contained, that is,

1. Of the name assumed to distinguish the company and to be used in its dealings by which it may sue or be sued.

2. Of the general route of the telegraph line owned and used by said company designating the points to be
202 connected.

3. Of the capital stock of said company and of the number of shares into which stock is and shall be divided.

4. Of the names and places of residence of the share-

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holders and the number of shares held by each of them respectively, and,

5. Of the period at which said company shall commence and terminate are in all respects full, true and correct.

In witness whereof, we have pursuant to the statute in such cases made and provided, made this certificate under our hands and seals, at the City of Rochester, in the County of Monroe and State of New York, this twentieth day of January, in the years of our Lord, one thousand eight hundred and fifty four.

HENRY S. POTTER. [L. S.]
ISAAC R. ELWOOD. [L. S.]
F. CLARKE. [L. S.]
HIRAM SIBLEY. [L. S.]
ISAAC BUTTS. [L. S.]
W. H. CHENEY. [L. S.]
J. MEDBURY. [L. S.]
J. B. STITTSON. [L. S.]
E. P. WILLIS. [L. S.]
WM. ALLING. [L. S.]

City of Rochester,
In Monroe County.

On the twentieth day of January, 1854, personally before me the subscriber appeared, Henry S. Potter, Isaac R. Elwood, Freeman Clarke, Hiram Sibley, Isaac Butts, William H. Cheney, Joseph Medbury, Jerome B. Stittson, Edmund P. Willis and William Alling, known to me to be the person described in and who executed the foregoing certificate, and severally, each for himself, acknowledged that he had executed the said certificate for the purposes therein mentioned and the said Henry S. Potter also acknowledged that he executed the foregoing official certificate as and being president of the New York & Mississippi Valley Printing Telegraph Company and the said Isaac R. Elwood acknowledged that he
203 executed the said last mentioned certificate as and being the secretary of the said company.

DANIEL B. BEACH,
Comr. of Deeds for said City.

State of New York,
Monroe County.

Clerk's Office, Rochester.

I certify that Dan'l B. Beard, Esq., was at the date of the certificate of proof or acknowledgment of the annexed instrument in writing a commissioner of deeds for the City of Rochester, in said county, duly authorized to take the same, that I am well acquainted with the hand writing and verily believe that the signature to said certificate is genuine, and that the annexed instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county, this 7th day of Feby., A. D. 1854.

W. B. WILLIAMS, Clerk.

Recorded, examined and compared with the original, Feb. 8, 1854, at 9 1/2 a. m.

L. LECLEAR,
Dep. Clerk.

204 United States of America,
State of New York, ss.
County of Erie.

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts in and for said county (the said courts being courts of record) do hereby certify that the above and foregoing is a true and complete copy of certificate of incorporation of the New York and Mississippi Valley Printing Telegraph Company, as the same appears of record in said Erie County Clerk's office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at Buffalo, this 25th day of May, 1912.

[Seal] (Sig.) J. H. PRICE,
Clerk.

United States of America,
State of New York, ss.
County of Erie.

I, Charles A. Pooley, a Justice of the Supreme Court in and for the Eighth Judicial District of the State of New York, and the presiding magistrate at a special term of the Supreme

Court, held in and for the County of Erie, in said district, hereby certify that the above attestation is in due form and by the proper officer.

In testimony whereof, I have hereunto subscribed my name, at Buffalo, this 25th day of May, 1912.

(Sig.) CHAS. A. POOLEY,
Justice of the Supreme Court.

205 United States of America,
State of New York, ss.
County of Erie.

I, John H. Price, Clerk of said County, and also Clerk of the Supreme and County Courts in and for said county (the said courts being courts of record), do hereby certify that the Hon. Charles A. Pooley, whose name is subscribed to the annexed and foregoing certificate, was at the time of the signing thereof, and now is a Justice of the Supreme Court of the State of New York, duly elected, commissioned and qualified, and that his signature is genuine; and further that he is the presiding magistrate at the special term of the Supreme Court aforesaid on the date hereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and courts, at Buffalo, this 25th day of May, 1912.

[Seal] (Sig.) J. H. PRICE,
Clerk.

206 Plaintiff's Exhibit No. 4.

Filed August 1st, 1912.

Postoffice Department,
Washington.

December 19, 1911.

I, Frank H. Hitchcock, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

In testimony whereof I have hereunto set my hand, and caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[Seal] (Sig.) FRANK H. HITCHCOCK,
Postmaster General.

207 Western Union Telegraph Company.

Meeting of the Board of Directors at the Executive Office, 145 Broadway, New York, June 5th, 1867.

Resolved, That this company does hereby accept the provisions of the Act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the acting president of the company, and the seal of the corporation in compliance with the fourth section of said Act of Congress.

Adopted unanimously.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Secy. W. U. Tel. Co.

Western Union
[Seal]
Telegraph Company.

208 Plaintiff's Exhibit No. 5.

Filed August 1st, 1912.

State of Louisiana.

I, the undersigned Assistant Secretary of State, of the State of Louisiana, do hereby certify that the annexed three pages, contain a true, complete and full copy of the Procuration, Acknowledgment of Signatures, and Copy of Resolution of the Board of Directors of the Western Union Telegraph Company of the City of New York City, New York, to Mr. T. P. Cummings, of the City of New Orleans, Louisiana, as appears by comparing the same with the originals now on file and of record in the archives of this office, filed in this office

on February 20th, 1906, and recorded in Book "Procurations," No. 3, Folio 16.

Given under my signature, authenticated with the impress of my seal of office, at the City of Baton Rouge, this, 1st day of May, A. D. 1912.

[Seal] (Sig.) EMILE J. O'BRIEN, JR.,
Assistant Secretary of State.

209 Act No. 54 of 1904.

Know All Men By These Presents:

That the Western Union Telegraph Company of New York City, in the State of New York, doing business, or being about to do business in the State of Louisiana, in conformity with the laws thereof, does, pursuant to the laws of said State, hereby make this its written declaration that the place or locality of its domicile is New York City, New York, that it is doing business at the following place in the State of Louisiana, to wit, the City of New Orleans and other cities and towns in the State, and that it does hereby make, constitute and appoint T. P. Cummings, of the City of New Orleans, Parish of Orleans, its true and lawful attorney, in and for the State of Louisiana, on whom all process of law, whether mesne or final, against said company, may be served in any action or special proceedings against said company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force and such other acts as may be hereafter passed amendatory thereof and supplementary thereto, and the said attorney is hereby duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases as provided for by the laws of the State of Louisiana, and such service shall be deemed valid personal service and binding upon this company, agreeably to Article 264 of the Constitution of Louisiana, and in compliance with Act No. 54 of 1904.

This appointment is to continue in force for the period of time and in the manner provided for by the statutes of the State of Louisiana, and until another attorney shall be duly and regularly substituted.

In witness whereof, the said company, in accordance with a resolution of its board of directors, duly passed on the 10th

day of January, A. D. 1906 (a certified copy of which is attached), has to these presents affixed its corporate
210 seal, and caused the same to be subscribed and attested to by its president and secretary, at the City of New York, in the State of New York, on the 10th day of January, A. D. 1906.

[Seal] (Signed) R. C. CLOWRY, President.
[Seal] (Signed) A. R. BREWER, Secretary.

211 Certified Copy of a Resolution Duly Passed by the Board of Directors of the Western Union Telegraph Company on the — Day of ——— 19—.

At a meeting of the executive committee of the board of directors of the Western Union Telegraph Company, held on the 10th day of January, A. D. 1906, at the office of the company in the City of New York, State of New York, a quorum of said committee being present, on motion the following resolution was duly passed:

"Resolved, That this company having been admitted or having applied for admission to transact business in the State of Louisiana, in conformity with the laws thereof, hereby makes, constitutes and appoints T. P. Cumming, of New Orleans, its true and lawful attorney in and for the State of Louisiana, with the powers hereinafter set forth; and hereby authorizes the president and secretary, under the corporate seal of the company, to file a written declaration in the office of the Secretary of State, setting forth the place or locality of the domicile of this corporation, the place or places in the State of Louisiana where it is doing business, and the name of its agent in said State upon whom process may be served, and for said purpose particularly does hereby authorize the said president and secretary, under the corporate seal of the company, to make, constitute and appoint T. P. Cummings, of the City of New Orleans, its true and lawful attorney, in and for the State of Louisiana, on whom all process of law, whether mesne or final, against said company, may be served in any action or special proceedings against said company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force, and such other acts as may hereafter be passed,

amendatory thereof and supplementary thereto; and the said attorney to be duly authorized and empowered, as the agent of said company, to receive and accept service of process, in all cases as provided for by the laws of the State of Louisiana, and such service to be deemed valid personal service and binding upon this company, agreeably to Article 264 of
212 the Constitution of Louisiana, and in compliance with Act 54 of 1904, said appointment is to continue in force for the period of time and in the manner provided for by the statutes of the State of Louisiana, and until another attorney shall be duly and regularly substituted."

I hereby certify that the above is a correct copy of the vote or [of] executive committee of the board of resolution of the directors of said company, authorizing the appointment of an attorney for the State of Louisiana.

Witness my hand and the seal of said The Western Union Telegraph Company at New York City, N. Y., this 10th day of January, 1906.

[Seal]

[Seal] (Signed) A. R. BREWER, Secretary.

213 State of New York,
County of New York. ss.
City of New York.

On this 11th day of January, 1906, before me, the subscriber, Charlotte A. Van Brunt, a notary public, duly appointed to take proof and acknowledgment of deeds and other instruments, came Robert C. Clowry, President, and A. R. Brewer, Secretary, of the Western Union Telegraph Company, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledge to me, in the presence of the subscribing witnesses, the execution of the same; and being by me each duly sworn severally and each for himself, deposeth and saith that they are the officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said company; and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof, I hereunto set my hand and affix my

official seal, at the City of New York, the day and year first above written.

[Seal]

[Seal] (Signed) CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County, No. 5.

Certificate filed in New York County. My commission expires March 30th, 1906.

214 Plaintiff's Exhibit No. 6.

Filed August 1st, 1912.

State of Louisiana.

I, the undersigned Assistant Secretary of State, of the State of Louisiana, do hereby certify that the annexed three pages, contain a true, complete and full copy of the Procuration, Acknowledgment of Signatures, and Copy of Resolution of the board of directors of the Louisville & Nashville Railroad Company of the City of Louisville, Jefferson County, Kentucky, to Mr. Charles Marshall, or in his absence A. J. Jacobs, of the City of New Orleans, Louisiana, as appears by comparing the same with the originals now on file and of record in the archives of this office, filed in this office on August 11th, 1908, and recorded in book "Procurations" No. 4, Folio 84.

Given under my signature, authenticated with the impress of my seal of office, at the City of Baton Rouge, this 1st day of May, A. D. 1912.

[Seal] (Sig.) EMILE J. O'BRIEN, JR.,
Assistant Secretary of State.

215 Act No. 54 of 1904.

Know All Men By These Presents:

That the Louisville & Nashville Railroad Company of Louisville, Jefferson County, in the State of Kentucky, doing business, or being about to do business in the State of Louisiana, in conformity with the laws thereof, does, pursuant to the laws of said State, hereby make this its written declaration that the place or locality of its domicile is New Orleans, La.; that it is doing business at the following place in the State of Louisiana, to wit: City of New Orleans, with stations at Lake Catherine, Chef Menteur, Michaud, Lee, Viavant, Gentilly in

Orleans Parish, and at Dunbar and Rigolets, Parish of St. Tammany, and that it does hereby make, constitute and appoint Charles Marshall, and in his absence A. J. Jacobs, both of the City of New Orleans, Parish of Orleans, its true and lawful attorney, in and for the State of Louisiana, on whom all process of law, whether mense [mesne] or final against said company, may be served in any action or special proceedings against said company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto, and the said attorney is hereby duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases as provided for by the laws of the State of Louisiana, and such service shall be deemed valid personal service and binding upon this company, agreeably to Article 264 of the Constitution of Louisiana and in compliance with Act No. 54 of 1904.

This appointment is to continue in force for the period of time and in the manner provided for by the statutes of the State of Louisiana, and until another attorney shall be duly and regularly substituted.

In witness whereof, the said company, in accordance with a resolution of its board of directors, duly passed on the 21st day of September, A. D. 1905 (a certified copy of which is hereto attached), and has to these presents affixed
216 its corporate seal, and caused the same to be subscribed and attested to by its president and secretary, at the City of Louisville, in the State of Kentucky, on the 11th day of July, A. D. 1908.

[Seal] (Signed) M. H. SMITH, President.
[Seal] (Signed) J. H. ELLIS, Secretary.

217 Certified Copy of a Resolution Duly Passed by the Board of Directors of the Louisville & Nashville Railroad Company on the 21st day of September, 1905.

At a meeting of the board of directors of the Louisville & Nashville Railroad Company, held on the 21st day of September, A. D. 1905, at the office of the company, in the City of New York, State of New York, a quorum of said board

being present, on motion the following resolution was duly passed:

"Resolved, That this company having been admitted or having applied for admission to transact business in the State of Louisiana, in conformity with the laws thereof, hereby makes, constitutes and appoints Charles Marshall, of New Orleans, and in his absence A. J. Jacobs of New Orleans, its true and lawful attorney in and for the State of Louisiana, with the powers hereinafter set forth; and hereby authorizes the president and secretary, under the corporate seal of the company, to file a written declaration in the office of the Secretary of State, setting forth the place or locality of the domicile of this corporation, the place or places in the State of Louisiana where it is doing business, and the name of its agent in said State upon whom process may be served, and for said purpose particularly does hereby authorize the said president and secretary, under the corporate seal of the company, to make, constitute and appoint Charles Marshall, and in his absence A. J. Jacobs, of the City of New Orleans, its true and lawful attorney, in and for the State of Louisiana, on whom all process of law, whether mesne or final, against said company, may be served in any action or special proceedings against said company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force, and such other acts as may hereafter be passed, amendatory thereof and supplementary thereto; and the said attorney to be duly authorized and empowered, as the agent of said company, to receive and accept service of process, in all cases as provided for by the laws of the State of Louisiana, and such service to be deemed valid personal service and binding upon this company, agreeably to Article 264 of the Constitution of Louisiana,
218 and in compliance with Act 54 of 1904, said appointment is to continue in force for the period of time and in the manner provided for by the statutes of the State of Louisiana, and until another attorney shall be duly and regularly substituted."

I hereby certify that the above is a correct copy of the vote or resolution of the directors of said company, authorizing the appointment of an attorney for the State of Louisiana.

Witness my hand and the seal of said Louisville & Nash-

ville Railroad Company at Louisville, Kentucky, this 11th day of July, 1908.

[Seal]
[Seal] (Signed) J. H. ELLIS, Secretary.

219 State of Kentucky,
County of Jefferson, ss.
City of Louisville.

On this 11th day of July, 1908, before me, the subscriber, G. W. B. Olmstead, ————————, duly appointed to take proof and acknowledgment of deeds and other instruments, came M. H. Smith, President, and J. H. Ellis, Secretary, of the Louisville & Nashville Railroad Company, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledge to me, in the presence of the subscribing witnesses, the execution of the same; and being by me each duly sworn, severally and each for himself, deposeth and saith that they are the officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said company; and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof, I hereunto set my hand and affix my official seal, at the City of Louisville, Ky., the day and year first above written.

[Seal]
[Seal] (Signed) G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

My commission expires January 29th, 1910.

220 Plaintiff's Exhibit No. 7.

Filed August 1st, 1912.

March 16, 1912.

Louisville & Nashville Railroad Company,
Louisville, Ky.

Gentlemen:

As, of course, your [you] are aware, the Western Union Telegraph Company has for many years, under the terms of the existing contract between that company and the Louisville

& Nashville Railroad Company, maintained a line of telegraph poles and wires and other appurtenances thereon over and along the strip of ground or right of way belonging to your company, varying in width from sixty to one hundred feet, beginning at a point in the City of New Orleans at the intersection of the property lines of Elysian Fields Street and LaForce Street (now N. Tonti Street) in Square No. 1210, and running thence in an easterly direction and forming a continuous strip of ground through the Parishes of Orleans and St. Tammany, to the thread of the stream of Pearl River, the dividing line between the States of Louisiana and Mississippi, a distance of 36.66 miles, 30.21 miles of the said length being in the Parish of Orleans, and 6.45 miles in the Parish of St. Tammany; and also over and along the bridges which have been constructed by the said Louisville & Nashville Railroad Company, where the said right of way crosses streams, notably the streams known as the "Little Rigolets" and "Rigolets."

The right of the said Western Union Telegraph Company under the said contract to so maintain its line of telegraph poles and wires and other appurtenances over the said strip of ground or right of way, will expire on the 17th day of August, 1912.

L. & N. R. R. Co.-2 3-16-12.

221 The Western Union Telegraph Company desires to acquire the right, after the expiration of its present contract right as aforesaid, to erect and maintain its said telegraph lines on and along the said right of way, and on its behalf we hereby offer you the sum of $5.00 per mile for the said right. If this price is satisfactory to you, we shall be pleased to meet you for the purpose of arranging matters of detail; but if we do not hear from you prior to March 25th, we will consider that this offer is rejected, and will take proceedings to expropriate the right in question.

Yours very truly,

F/M .....

Attorneys for Western Union Telegraph Company.

222 Defendant's Exhibit No. 1.

Filed August 2nd, 1912.

United States District Court.

Western Union Telegraph Co.
vs. No. 14,528
Louisville & Nashville R. R. Co.

An Act to Charter the Louisville & Nashville Railroad Company. Approved March 5, 1850.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That Colonel Thomas Anderson, James S. Speed, James Guthrie, Levin L. Shreve, and William F. Bullock, of the City of Louisville; Robert N. Miller, Joshua F. Speed, David Meriwether, Thomas S. Camp, and Edward D. Hobbs, of the County of Jefferson; J. G. Guthrie, C. D. Shean, Daniel K. Haycraft, S. B. Thomas, John Cofer, John L. Helmn, and George L. Miles, of the County of Hardin; George T. Wood, David Highbaugh, Thomas Lafferty, William Lewis, J. B. Cobb, O. G. Waggener, W. H. Powell, Aden Combs, and George Garland House, of the County of Hart; Israel A. Cook, Wm. Ford, Ambrose Kirtley, W. C. Lucas, and A. M. Barret, of the County of Edmondson; Sam'l Murrell, Henry Grider, John B. Helm, Warner L. Underwood, Thomas Quigley, and Benjamin C. Smith, of the County of Warren; John Hoy, Noah Hampton, Standford Duncan, W. H. McGoodwin, L. Finn and William H. Wooten, of the County of Simpson; R. F. Samuels, R. H. Field, H. F. Kalfus, H. C. Thomas, N. C. Summers, W. R. Thompson, N. P. Sanders, and W. B. Hamilton, of the County of Bullitt; C. Nourse, Joseph Brown, D. S. Howell, C. P. Mattingly, J. M. Doom, E. B. Smith, G. W. Hite, James M. Brown, S. Johnson, John H. Talbott, T. W. Riley, and T. P. Linthicum, of the County of Nelson; S. W. D. Stone, J. H. Rodman, John Duncan, W. P. Read, W. L. Morris, W. Howell, and J. P. Hamilton, of the County of Larue; A. Watkins, J. G. Hardy, P. J. Kirtley, G. W. Trabue, F. Gorin, A. Trigg, R. Murrell, John T. Rogers, James Page, W. E. Mun-
223 ford, J. P. Bates and W. J. Wood, Jr., of the

County of Barren; John H. Page, W. F. Evans, A. A. Harvey, Samuel Carpenter, W. Thomas, R. J. Foster, James C. Mulligan, and James Stark, of the County of Allen; Josiah Brummall, John Barret, W. B. Allen, Woodson Williams, and Peter Anderson, of the County of Green; A. Hoskins, R. Calvin, Alfred Hazelwood, A. F. Growdy, Ignatius Abell, and W. N. Marshall, of the County of Taylor; be, and they are hereby, appointed commissioners under the direction of whom, or any three of them, in each of said counties and city aforesaid, subscriptions may be received to the capital stock of the Louisville & Nashville Railroad Company, hereby incorporated; and they may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper; and after the first opening of said books they may continue them open for such time, and may adjourn to such places, as they may deem expedient; and if such a subscription to the capital stock of said company as is necessary to its incorporation shall not have been obtained, said commissioners, or a majority of them, may cause the said books to be opened and kept open, from time to time, and at such places as they may deem expedient, for the space of two years thereafter or until the sum necessary for the incorporation shall be subscribed: Provided, that any subscription, tendered at any time or place other than that advised by said commissioners, if accepted by them, shall be as valid against the party subscribing as if received at the time or place advertised; and if any of said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved on them by this act, another may be appointed in his stead by the remaining commissioners, or a majority of them, of the county for which the said commissioner, so not acting, was appointed a commissioner.

Sec. 2. That the capital stock of said Louisville & Nashville Railroad Company shall be three millions of
224 dollars, in shares of one hundred dollars each, which may be subscribed for by any individual or corporation; and as soon as three thousand shares of said capital stock shall be subscribed, the subscribers of said stock, their successors and assigns, shall be, and they are hereby declared to be,

incorporated into a company by the name of the Louisville & Nashville Railroad Company, and by that name shall be capable of purchasing, holding, selling, leasing, and conveying real estate not exceeding ten thousand acres, and personal and mixed estate, so far as the same shall be necessary for the purposes of their corporation, and no further; and shall have perpetual succession, and by said corporate name shall sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at pleasure; and shall have, enjoy, and exercise all the powers, rights, and privileges which other corporate bodies may lawfully do.

Sec. 3. That if more than thirty thousand shares shall be subscribed to the capital stock of said company, the said commissioners, or a majority of them, shall reduce by striking off in succession from the largest number of shares subscribed by single individuals or corporations, until the subscriptions shall be reduced to thirty thousand shares, so as to equalize the stockholders as far as may be.

Sec. 4. That at every subscription of stock there shall be paid at the time of subscribing, to the said commissioners, or their agents appointed to receive such subscriptions, either in money, or a note negotiable and payable at some bank in the State, as said commissioners may elect, at sixty days date or longer, at the option of the commissioners or their agents, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such installments and at such times as may be required by the board of directors of said company: Provided, that no payment shall be demanded until at least thirty days' public notice of such demand shall have been given by said board of directors, by a publication in one or more of the newspapers published in Louisville, Bardstown, Glasgow, Elizabethtown, and Bowling Green; nor shall more than twenty-five per cent. of each share of the stock be called for in any one year; but if the exigencies of the company should require the payments of the stocks to be made more rapidly than is provided for herein, or should the board of directors, or a majority of the whole number elected, consider it expedient, it shall be lawful for them to borrow, on the credit of said company, a sum of money not exceeding five hundred thousand dollars; and if any sub-

scriber shall fail or neglect to pay any installment or part of said subscription demanded according to the provisions of this section, the same may be recovered by action, in the name of said corporation against such defaulting subscriber, before any tribunal having jurisdiction of such cases; and in all such actions, publications, as directed in this section, shall be the only demand necessary to be proved; or, in case such failure or neglect to pay any installment or part of said subscription, demanded according to the provisions of this section, shall continue for the space of sixty days next after the time the same shall be due and payable, the board of directors may, in their discretion, order that the same shall be forfeited to the company, and they may also sell it for the benefit of the company, if they think proper; but said board of directors, by a majority of the whole board, may remit any such forfeiture on such terms as they may think proper: And provided further, that it shall be lawful to receive subscriptions to the capital stock of this company, payable in contracts, well secured, to build such parts of the road, or to perform such work in the construction thereof, as may be accepted by the company.

Sec. 5. That if the subscription herein made necessary to the incorporation of said company shall not be obtained within ten years after the first opening of the books by the commissioners under this act, then this act, and all the subscriptions under it, shall be null and void; and said commissioner shall, after discharging the expenses of opening the books, return the residue of the money paid in upon the subscriptions to the several subscribers, in proportion to the sums
226 respectively paid by each.

Sec. 6. That at the expiration of the period for which the books are first opened, if two thousand shares of the capital stock shall have been subscribed, or, if not, as soon thereafter as the same shall be subscribed, if within ten years after the first opening of said books, said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days' public notice thereof, in some one or more of the newspapers published in Louisville, Bardstown, Glasgow, Elizabethtown, and Bowling Green; and at such meeting said

commissioners shall lay the subscription books before the subscribers then and there present, and thereupon the said subscribers, or a majority of them, then present, shall have power to elect from among the stockholders seven directors by ballot, to manage the affairs of said company; and these seven directors, or a majority of them, shall have the power to elect a president of said company, either from among the directors of any other stockholder, and of allowing such compensation for his services as they may think proper; and in such election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her; and every stockholder may, in writing, depute any other person to vote and act as its, his, or her, proxy; and the commissioners aforesaid, or any three or more of them, shall be the judges of said first election of directors.

Sec. 7. That, to continue the succession of the president and directors of said company, seven directors shall be chosen annually of the first Monday in June, every year, by the stockholders of said company, at such place as the president and directors may designate: Provided, that after the first election the said president and directors may change the time and place of holding all subsequent elections, upon
227 publishing such change not less than thirty days prior to the election in the papers aforesaid; and that the directors of said company, or a majority of them, shall have the power to appoint judges of all elections, and to elect a president of said company, either from among the directors or any other stockholder, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur, by death, resignation, or refusal to act of any president or director, before the year for which he was elected has expired, a person to fill such vacancy for the year shall be appointed by the president and directors of said company, or a majority of them; and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act or by the by-laws of said company to be made at a particular time, if not made at such time, may be made in thirty days thereafter, upon notice publicly given.

Sec. 8. That a general meeting of the stockholders of said company may be called, at any time during the interval between the annual meetings, by the president and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days' notice of the time and place of holding the same, in one or more newspapers published in Louisville, Bardstown, Glasgow, Elizabethtown, and Bowling Green; and when any such meetings are called by the stockholders, such notice shall specify the object of the call; and if, at any such called meetings, a majority, in value, of the stockholders are not present in person or by proxy, the same shall be adjourned from day to day, without transacting any business, for any time not exceeding five days; and if within said five days, stockholders having a majority, in value, of the stock subscribed, do not attend, such meeting shall be dissolved.

228 Sec. 9. That at the regular annual meeting of the stockholders of said company it shall be the duty of the president and directors in office for the preceding year, to exhibit a clear and distinct account of the affairs of the company; that at any called meeting of the stockholders, a majority in value, of the holders of the stock subscribed being present, may demand and require similar statements from the president and directors, whose duty it shall be to furnish them, when thus required; and that, at all general meetings of the stockholders in said company, a majority of them, in value, may remove from office the president or any of the directors, and fill up the vacancies thus made, in the same manner that they could do at their stated annual meetings.

Sec. 10. That the president and directors of said company before he or they act as such, shall swear or affirm, as the case may be, that they will well and truly discharge the duties of their respective offices, to the best of their skill and judgment, and the said president and directors, or a majority of them, or a majority, in value, of the stockholders in said company, at any of stated or called meetings of said stockholders, shall have power to elect or appoint a treasurer of said company, and to require and take of him such bond, in such penalty and with such securities as they may prescribe, payable to said company, and conditioned to the faithful keep-

ing and disbursing of all such moneys as may come to his hands, and with such other conditions as may be prescribed; upon which said bond recovery may be had for a breach of the conditions thereof by suit in the name of said company in any court having jurisdiction thereof.

Sec. 11. That if any of the stock created by this act shall remain unsubscribed until after the election of the president and directors, as provided for in the sixth section of this act, the said president and directors, or a majority of them, shall have power to open books and receive subscriptions to any of the capital stock which may remain untaken or unsubscribed for, or to sell or dispose of such untaken stock for
229 the benefit of the company, not under its par value; and the subscribers or purchasers of said stock shall have all the rights of original subscribers, and subject to the same regulations.

Sec. 12. That the said president and directors, or a majority of them, may appoint all such officers, agents, or servants, as they may deem expedient for the business of the company, and they may remove any of them at pleasure; that they or a majority of them may determine, by contract, the pay of such officers, agents, and servants, and regulate by by-laws the manner of adjusting all accounts against the company; that they shall have power to errect warehouses, work-shops, depots, and all other buildings necessary for the transaction of the business of the company; that they shall have power to direct and regulate in what manner, and by what evidence, stock in said company may be transferred; and to pass all by-laws which they may deem necessary or proper for exercising the powers hereby vested in said company, and for carrying into effect this act: Provided, the same shall not be contrary to the laws of the United States or of this State.

Sec. 13. That if the capital stock of said company shall be deemed insufficient for the purpose of this act, it shall any [and] may be lawful for the president and directors of said company, or a majority of them, to increase the same by the addition of as many shares as they may deem necessary, not exceeding one million of dollars, giving notice as hereinbefore prescribed.

Sec. 14. That the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the City of Louisville to the Tennessee line, in the direction of Nashville; the route to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any parts of it; and that they, their agents, engineers, etc., or those with whom they may contract for surveying or making the same, or any part thereof, may enter upon, use, and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other structures or works necessary to said road and its use, or for any other purposes necessary or useful in the construction or repair of said road, or its work and appurtenances; and they may build bridges and construct tunnels provided the same do not obstruct the navigation on navigable streams; may fix scales and weights, lay rails, take and use any earth, timber, gravel, stone, or other material, which may be useful or necessary for the proper construction, completion or repair of said road.

Sec. 15. That the president and directors of said company, or a majority of them, or their authorized agents, may agree with the owner of any land, earth, timber, or stone, or any other material, or any improvements which may be wanted for the construction or repair of any of said roads, or any of their works, for the purchase of the use and occupation of the same, and if they cannot agree, and if the owner or owners, or any of them be a feme covert, under age, non compos mentis, or out of the county in which the property wanted may lie where such land and materials may be wanted, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant, under his hand, directed to the sheriff of such county, requiring him to summon a jury of twenty inhabitants, not related, or in any wise interested, to meet on the land or near the property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same; and if at the time and place, any of said jurors do not attend, said sheriff shall forthwith summon as many jurors as may be necessary, with the jurors in attendance,

and from them each party, or, if not present by agent or otherwise, the sheriff then, for the party absent, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and, before they act as such,
231 the said sheriff shall administer to each of them an oath or affirmation, that he will justly and impartially fix the damages which the owner or owners shall sustain by the use and occupation of the said property required by the company; and the said jury, in estimating such damages, shall take into consideration the benefits resulting to the owner from conducting said road by, through, or near the property of said owners; but only in extinguishment of damages; and said jury shall reduce their verdict to writing, and shall sign the same, and it shall be returned by the sheriff to the clerk of his county, and by such clerk shall be filed in his office, and shall be confirmed by the court of said county, at its next session, if no sufficient cause to the contrary be shown; and, when so confirmed, shall be recorded by said clerk, at the expense of said company; but, is [if] set aside, the court may direct another inquisition to be taken, in the same manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the duration of interest in the same, valued for the company; and such valuation, when tendered or paid to the owner or owners of said property, or his, her, or their legal representatives, or to the clerk of the county in which said inquest is held, for their use, when said owners, etc., do not reside in said county, shall entitle said company to the estate and interest in the same, thus valued, as fully as if it had been conveyed to it by the owner or owners of the same; and the valuation of the same, if not received when tendered, may, at any time thereafter, be received from the company without costs by the owner or owners, his, or their legal representatives or heirs.

Sec. 16. That whenever, in the construction of said road or roads, it shall be necessary to intersect any other established road or way, it shall be the duty of said president and directors so to construct said road across such road or way as not to impede the passage, or persons, or property along the same; or where it shall be necessary to pass through the
232 land of any person, it shall also be their duty to

provide for such person proper wagon ways across said railroad, from one part of the land to the other; and if said company shall fail to provide proper wagon ways across said road, as provided in this section, it shall be lawful for any person to sue said company, and be entitled to such damage as a jury may think him or her entitled to for such neglect.

Sec. 17. That whenever it shall be necessary for said company to have, use, or occupy any land, materials, or other property, in order to the construction or repair of any part of said road or roads, or their works or necessary buildings, the president and directors of said company, or their agents, or those contracting with them for working or repairing the same, may immediately take and use the same, they having first caused the property wanted to viewed by a jury (formed in the manner hereinbefore prescribed in those cases where property is to be changed or altered by admixture with other substances, before such alteration is made), and that it shall not be necessary, after such view, in order to the use and occupation of the same, to wait the issue of the proceedings upon such view; and the inquest of the jury, after the payment or tender of such valuation shall be a bar to all actions for taking and using such property, whether begun before or after such confirmation, or the payment of said valuation.

Sec. 18. That the president and directors shall have power to purchase with the funds of said company, and place on any railroads constructed by them under this act, all machines, wagons, vehicles, or carriages of any kind which they may deem proper, for the purposes of transportation on said road; and that they shall have the power to charge for tolls, and the transportation of persons, merchandise, and property of any kind whatever, transported along said railway, any sum not exceeding the following rates, to-wit: On all goods, merchandise, or property, for every one hundred pounds
233 transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock, and every description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort; that it shall not be lawful for any other company, or any other person or persons, to travel upon or use

any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof; and that the said road or roads with all their works, improvements, or profits, and all the carriages, vehicles, and machinery for transportation used therein, and all other species of property thereunto belonging, are hereby vested in said company, incorporated by this act, and their successors forever; and shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the Legislature of this Commonwealth, for the space of thirty years, authorize any other railroad to be laid down on a parallel line with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles: Provided, full power is hereby reserved to this State to incorporate, hereafter, a company or companies to build a railroad or railroads, and that any and all such railroad or railroads, hereafter constructed, may connect and join with the road hereby contemplated; and full right and privilege is hereby reserved to the State, or individuals, or any company heretofore or hereafter incorporated by law of this State, to cross this road: Provided, any other railroad connecting with the road hereby provided for shall lead from the main route and diverge therefrom at an angle of twenty degrees or more: Provided, that in forming such connection, or in crossing said road, no injury be done to the works of the company hereby incorporated; and that nothing in this act shall be so construed as to deprive any subsequent Legislature of the power to authorize the "Kentucky & Mississippi Railroad
234 Company" to extend their said road from Hopkinsville to Louisville, or of the power at any time hereafter of incorporating a company to construct a railroad from Louisville to some point upon the Mississippi River in this State.

Sec. 19. That the said president and directors shall, annually or semi-annually, declare and make such dividends as they may deem proper, of the net profits arising from the resources of said company after deducting the necessary current and probable contingent expenses; and that they shall divide the same among the stockholders of said company in proportion to their respective shares.

Sec. 20. That if any person or persons shall willfully, by any means whatsoever, injure, impair, or destroy any part of any railroads, or road constructed for said company, under this act, or any of their works, buildings, carriages, vehicles, or machinery, such person or persons shall, for every such offense, forfeit and pay to the said company a sum not exceeding five hundred dollars, recoverable in the name of said company, by an action of debt in the circuit court of the county wherein such offense shall be committed; and shall also be subject to indictment by the grand jury of said county, in said court, and upon conviction of such offense, be imprisoned in the jail thereof, and in the penitentiary, not less than six months no [nor] more than four years, in the discretion of a jury.

Sec. 21. That as soon as the company shall have completed five miles of their route, they may commence and prosecute their business upon the terms and upon stipulations herein provided, as though the whole work was completed.

Sec. 22. That the corporation of the City of Louisville, and the county courts of the counties of Jefferson, Bullitt, Nelson, Larue, Barren, Allen, Green, Taylor, Hardin, Hart, Edmonson, Warren, and Simpson, and of any other counties through which this road may pass, a majority of all the members of the board of councilmen of said city, and of
235 the county courts of said counties concurring therein, be, and they are here authorized, to subscribe for and on behalf of said cities and counties, as many shares in the capital stock of said railroad as to them may seem expedient, and to levy the sum so subscribed on the taxable property of said city or counties; and the better to ascertain the public sentiment of said city and counties in reference to the propriety of said subscriptions of stock herein authorized, said board of councilmen and county courts are hereby authorized, if by them deemed expedient, in such manner as they may direct and prescribe, to submit the same to a vote of the qualified voters of said city and counties, respectively.

THOS. W. RILEY,
Speaker of the House of Representatives.
JOHN L. HELM,
Speaker of the Senate.

Approved.

J. J. CRITTENDEN.

March 5th, 1850.

By the Governor:
J. F. BELL,
Secretary of State.

236 Commonwealth of Kentucky.
Office of Secretary of State.

I, John W. Headley, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof, I hereto sign my name, and cause my official seal to be affixed.

Done at Frankfort, this 9th day of April, 1894.

(Signed) JOHN W. HEADLEY,
[Seal] Secretary of State.
By EDW. O. LEIGH,
Assistant Secretary of State.

237 Exhibit Marked Defendant 2.

Filed August 2nd, 1912.

United States District Court, Eastern District of Louisiana.

Western Union Telegraph Company
vs. No. 14528
Louisville & Nashville Railroad Company.

Extracts from the minutes of a meeting of the board of directors of the Louisville & Nashville Railroad Company held at the office of the company in New York City, on Thursday, December 21st, 1911, at which a quorum was present.

"The following resolution was offered by Mr. Smith, duly seconded and adopted:

Whereas, this company has by articles of amendment to its

charter, duly adopted, signed, executed, filed, and recorded in accordance with the laws of the State of Kentucky been authorized and empowered to exercise all the powers, rights, privileges and franchises now or which may hereafter be conferred on a telegraph company or telephone company by the laws of said State, or which may be obtained thereunder, and to acquire, construct, establish, maintain, and operate in said State, and in other States of the United States, in accordance with the laws of such other States, a telegraph system or telephone system, or both, for the purpose of conducting its own business as a common carrier by railroads, and the business and service of a common carrier by telegraph or telephone, or both, including the power and authority to construct, establish, maintain, and operate conduits, subways, or manholes, wires, poles, and other equipments, on, over, along, under, or through its present railroad right of way, or such right of way as it may hereafter lawfully acquire by purchase or otherwise, in the State of Kentucky and in other States of the United States, and on, over, along, or under all public highways, streets, avenues, alleys, and other public places, for the purpose of running or operating the subways, manholes, poles, wires, and other equipments necessary to construct, establish, maintain, and operate its said tele-
238 graph system or its said telephone system, or both, in the State of Kentucky and in other States of the United States, in accordance with the laws thereof; and,

Whereas, the Congress of the United States passed an act entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, the provision of which now constitute the larger part of Sections 5263, 5264, 5265, 5266, 5267, and 5268, U. S. Compiled Statutes, 1901, Volume 3, Title LXV, Telegraphs, pages 3579-81 and Section 5268, thereof provides:

> "Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law;"

Now, therefore, be it

Resolved, by this board of directors, acting for and on behalf of the Louisville & Nashville Railroad Company, That the president of this company be and he is hereby authorized and directed to execute the written acceptance by this company of the provision of said Act of Congress as provided in the sections aforesaid, and of the restrictions and obligations required by law, which written acceptance shall be attested by the secretary or assistant secretary, with the official seal of this company affixed, and filed with the Postmaster General of the United States, at Washington, D. C., accompanied by a certified copy of this resolution.

I, J. H. Ellis, secretary of the Louisville & Nashville Railroad Company, hereby certify that the foregoing is a true and correct copy as taken from the record.

[Seal] (Signed) J. H. ELLIS, Secretary.

January 2nd, 1912.

239 Defendant's Exhibit No. 3.

Filed August 2nd, 1912.

Whereas, the Louisville & Nashville Railroad Company is a corporation organized and existing under an act of the Legislature of the State of Kentucky, entitled "An act to charter the Louisville & Nashville Railroad Company," approved March 5, 1850, and sundry amendments thereto, capitalized at sixty million ($60,000.00) dollars, divided into six hundred thousand (600,000) shares of one hundred ($100.00) dollars each, par value; and

Whereas, the said company, by its board of directors, at meeting held pursuant to due notice on July 11, 1902, a quorum being present, duly adopted the following resolutions by the affirmative vote of every director present, to-wit:

"Resolved that the Louisville & Nashville Railroad Company hereby accepts the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891;

"Resolved That the Louisville & Nashville Railroad Company hereby accepts the provisions of Chapter 32 of the Ken-

tucky Statutes, being the act adopted April 5, 1893, with the amendments thereto;

"Resolved, That a copy of these resolutions be attested under the seal of the corporation by the chairman of the board and by the assistant secretary, and that the same be filed in the office of the Secretary of State of Kentucky;" and

Whereas, a copy of the foregoing resolution, duly certified by the chairman and assistant secretary of said company's board of directors, under the official seal of said company, was duly filed on July 14, 1902, in the office of the Secretary of State of Kentucky, pursuant to Section 190 of the Constitution, and Section 570 of the Statutes of said State; and

Whereas, the owners of two-thirds or more, to-
240 wit, 460.085 shares of the capital stock of said company have heretofore consented in writing signed by them that the charter of said company shall be amended to the extent and in the particulars hereinafter set forth, which instrument of writing is now on file with the Secretary of said company:

Now, therefore, we, the undersigned, being a majority of the directors of said company, do hereby adopt, sign and acknowledge the following amendments to the charter of the said Louisville & Nashville Railroad Company, to-wit:

Article 1. The said Louisville & Nashville Railroad Company, in addition to its present powers, rights, privileges, and franchises as a common carrier by railroad, shall hereafter have and be and it is hereby empowered and authorized to exercise all the powers, rights, privileges, and franchises now or which may hereafter be conferred on a telegraph company or a telephone company by the laws of the State of Kentucky, or which may be obtained thereunder, necessary to the conduct of its own business as a railroad, as well as to the conduct of its business and service to the general public as a common carrier of messages and communications by telegraph of telephone instruments, wires, lines, and other equipments.

Article 2. Said Louisville & Nashville Railroad Company shall, in order to exercise its powers, rights, privileges, franchises and business, as set forth in Article 1 hereof, be and it is hereby empowered and authorized to acquire, construct,

establish, maintain and operate in this State and in other States of the United States, in accordance with the laws of such other State, a telegraph system or a telephone system, or both, for the purpose of conducting its own business as a common carrier by railroad and the business and service of
241 a common carrier by telegraph or telephone, or both, including the power and authority to construct, establish, maintain, and operate conduits, subways, manholes, wires, poles, and other equipments on, over, along, under, or through its present railroad right of way, or such right of way as it may hereafter lawfully acquire by purchase or otherwise, in this State and in other States of the United States, and on, over, along, or under all public highways, streets, avenues, alleys, and other public places, for the purpose of running or operating the subways, manholes, poles, wires, and other equipments necessary to construct, establish, maintain, and operate its said telegraph system or its said telephone system, or both, in this State or in any other State of the United States in accordance with the laws thereof.

In testimony whereof, we have hereunto subscribed our names, this 2nd day of November, 1911.

H. WALTERS, Director.
WALTER G. OAKMAN, Director.
DARWIN P. KINGSLEY, Director.
EDWARD W. SHELDON, Director.
WARREN DELANO, Director.
JOHN I. WATERBURY, Director.
AUGUST BELMONT, Director.
GARDINER M. LANE, Director.
ALEXANDER HAMILTON, Director.
MICHAEL JENKINS, Director.
W. G. RAOUL, Director.
M. H. SMITH, Director.
L. W. BOTTS, Director.

State of Kentucky,
Jefferson County. Sct.

I, G. W. B. Olmstead, a notary public, in and for the county and State aforesaid, do certify that on this
242 day personally appeared before me M. H. Smith, and L. W. Botts, personally known to me to be directors of the Louisville & Nashville Railroad Company, and jointly

and severally acknowledged that the [they] adopted, signed, and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be their act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal, this the 22nd day of November, 1911. My commission expires on the 24th day of January, 1914.

G. W. B. OLMSTEAD,

(Seal) Notary Public, Jefferson County, Kentucky.

State of New York,
City of New York, Sct.

I, Marshall K. Weidensaul, a notary public in and for the city and State aforesaid, do certify that on this date personally appeared before me, H. Walters, Walter G. Oakman, Darwin P. Kingsley, Edward W. Sheldon, Warren Delano and John I. Waterbury, personally known to me to be directors of the Louisville & Nashville Railroad Company, and jointly and severally acknowledged that they adopted, signed, and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be their act and deed, and for and on behalf of said company, and for the purpose therein mentioned.

In testimony whereof, I have hereunto set my hand and official seal, this the 2nd day of November, 1911. My commission expires on the 30th day of March, 1913.

M. K. WEIDENSAUL, #124

243 (Seal) Notary Public, City and State of New York.

State of New York,
City of New York, Sct.

I, Marshall K. Weidensaul, a notary public in and for the city and State aforesaid, do certify that on this date personally appeared before me August Belmont, personally known to me to be a director of the Louisville & Nashville Railroad Company, and acknowledged that he adopted, signed and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be his act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and

official seal, this the 3rd day of November, 1911. My commission expires on the 30th day of March, 1913.

M. K. WEIDENSAUL,

(Seal) Notary Public, City and State of New York.

State of New York,
City of New York, Sct.

I, Marshall K. Weidensaul, a notary public in and for the city and State aforesaid, do certify that on this day personally appeared before me Gardiner M. Lane, personally known to me to be a director of the Louisville & Nashville Railroad Company, and acknowledged, that he adopted, signed and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be his act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

In testimony whereof, I have hereunto set my
244 hand and official seal, this the 6th day of November, 1911. My commission expires on the 30th day of March, 1913.

M. K. WEIDENSAUL,

(Seal) Notary Public, City and State of New York.

State of Virginia,
City of Petersburg, Sct.

I, M. B. Cogbill, a notary public in and for the city and State aforesaid, do certify that on this day personally appeared before me Alexander Hamilton, personally known to me to be a director of the Louisville & Nashville Railroad Company, and acknowledged that he adopted, signed and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be his act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and official seal, this the 8th day of November, 1911. My commission expires on the 25th day of February, 1913.

M. B. COGBILL,

(Seal) Notary Public, City of Petersburg, State of Virginia.

No tax required on seal.

State of Maryland,
City of Baltimore, Set.

I, Geo. B. Gammie, a notary public in and for the city and State aforesaid, do certify that on this day personally appeared before me Michael Jenkins, personally known to me to be a director of the Louisville & Nashville Railroad Company, and acknowledged that he adopted, signed and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be his act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

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In testimony whereof, I have hereunto set my hand and official seal, this the 10th day of November, 1911. My commission expires on the first day of May, 1912.

GEO. B. GAMMIE,
(Seal) Notary Public, City of Baltimore, State of Maryland.

State of Georgia,
Fulton County,
City of Atlanta, Set.

I, B. W. Tye, a notary public in and for the city, county and State aforesaid, do certify that on this day personally appeared before me W. G. Raoul, personally known to me to be a director of the Louisville & Nashville Railroad Company, and acknowledged that he adopted, signed and executed the foregoing articles of amendment to the charter of the Louisville & Nashville Railroad Company, to be his act and deed, and for and on behalf of said company, and for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and official seal, this the 17th day of November, 1911. My commission expires on the 12th day of Feby., 1914.

B. W. TYE,
(Seal) Notary Public, Fulton County, State of Georgia.

I, P. S. Ray, clerk of the County Court of Jefferson County, in the State of Kentucky, do certify that on this day at 10:02 o'clock A. M. the foregoing amended articles of in-

246 corporation were produced to me in my office, and that I have recorded them, this and the foregoing certificates in my said office.

Witness my hand this 23 day of Nov., 1911.

P. S. RAY, Clerk.

This is a true copy of the foregoing amended articles of incorporation as appears of record in Corporation Book 20, page 454, in the office of the clerk of the Jefferson County Court, Kentucky.

A copy attest:

P. S. RAY, Clerk.
By V. SMITHERS, D. C.

State of Kentucky,
Jefferson County, Set.

The undersigned, M. H. Smith, president, and J. H. Ellis, secretary, of the Louisville & Nashville Railroad Company, do hereby certify that the foregoing is a true copy of the amended articles to the charter of the Louisville & Nashville Railroad Company, jointly and severally acknowledged, adopted, signed, and executed by all of the thirteen directors thereof to be their act and deed and for and on behalf of said company, and for the purposes therein mentioned, and duly recorded as required by law on the 23rd day of November, 1911, in the office of the County Court Clerk of Jefferson County, State of Kentucky, in which its principal office or place of business is located, this attestation and certificate being made as required by Section 764, Kentucky statutes, in order that the foregoing copy may be duly filed in the office of the secretary of state of the State of Kentucky.

Given under our hands and official seal of said company this 28th day of November, 1911.

M. H. SMITH.

247 (Seal) J. H. ELLIS.

Indorsed by the secretary of state as follows: "Filed and certificate issued December 1st, 1911. Ben L. Bruner, Secretary of State."

248 Commissioners:
A. T. Siler, 3rd Dist., Chairman,
Williamsburg, Ky.
Laurence B. Finn, 1st Dist.,
Franklin, Ky.
L. P. Tarlton, 2nd Dist.,
Frankfort, Ky.

Roy Wilhoit, Rate Clerk, Louisville, Ky.
D. B. Cornett, Secretary, Frankfort, Ky.
Minnie Murphy, Official Stenographer, Williamsburg, Ky.

Kentucky.

Commonwealth of Kentucky.
United We Stand, Divided We Fall.

Railroad Commission,
Frankfort.

State of Kentucky,
Office of the Railroad Commission.

I, D. B. Cornett, secretary of the Kentucky Railroad Commission, hereby certify that the Louisville & Nashville Railroad Company has this day filed certified copy of its "Amended Articles to the Charter of the Louisville & Nashville Railroad Company" in this office, in compliance with Section 764 of the Kentucky statutes.

Witness my official hand this 4th day of December, 1911.

(Signed) D. B. CORNETT,
Secretary, Kentucky Railroad Commission.

249 Commonwealth of Kentucky.

Office of the Secretary of State.

Certificate.

I, Ben L. Bruner, secretary of state for the Commonwealth of Kentucky, do certify that the foregoing writing has been carefully compared by me with the original record thereof, now in my official custody as secretary of state and remaining

on file in my office, and found to be a true and correct copy of amendment to the charter of the Louisville & Nashville Railroad Company.

In witness whereof, I have hereunto set my hand, and affixed my official seal.

Done at Frankfort, this 28th day of December, 1911.

(Sig.) BEN L. BRUNER,
Secretary of State.

(Seal)

250 COPY OF AMENDED ARTICLES OF INCORPORATION OF THE LOUISVILLE & NASHVILLE R. R. CO., MARKED "DEFENDANT'S EXHIBIT 4.

Filed August 2nd, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
versus No. 14,528.
Louisville & Nashville R. R. Co.

Note: The above mentioned exhibit is the same as Defendant's Exhibit 3, commencing at page 239 of this transcript, down through line 12 on page 246 of said transcript, with the exception of the last certificate on Defendant's Exhibit 4, which is as follows, to-wit:

State of Kentucky,
County of Jefferson.

I, P. S. Ray, clerk of the County Court of Jefferson County, in the State of Kentucky, hereby certify that under the laws of the State of Kentucky, I as such clerk have the custody of the corporation books of Jefferson County, Kentucky, in which the laws of said State require that articles of incorporation be recorded; and I further certify that the above and foregoing pages contains a correct transcript of the articles of incorporation as amended of the Louisville & Nashville Railroad Company, as shown of record in my office on page 454, Corporation Book 20; and I further certify that I have compared

said transcript with said original record and I certify that the above transcript is a correct transcript of the whole of said original record.

In testimony whereof, I have hereunto set my hand and affixed the official seal of Jefferson County, Kentucky, of which I am the custodian at Louisville, Kentucky, this 2nd day of January, 1912.

(Signed) P. S. RAY,
(Seal) Clerk, Jefferson County Court, Kentucky.

251 DEFENDANT'S EXHIBIT 5.

Filed August 2nd, 1912.

United States District Court, Eastern District of Louisiana.

Western Union Telegraph Company
vs. No. 14528.
Louisville & Nashville Railroad Company.

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27479 G G T
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Post Office Department,
Washington.

I, Frank H. Hitchcock, postmaster general of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

In testimony whereof, I have hereto set my hand, and caused the seal of the post office department to be affixed, at the City of Washington, the day and year above written.

(Signed) FRANK H. HITCHCOCK,
(Seal) Postmaster General.

252 Form 23.

To All Whom It May Concern:

Be it known, that the Louisville & Nashville Railroad Company, a corporate body, organized under the laws of Kentucky, through its duly authorized officers, whose signatures are here-

unto attached, does hereby accept, without reservation, all of the restrictions and obligations of the act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." And the said company does especially agree that telegrams between the several departments of the government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the postmaster general.

This declaration of acceptance is made in order that said Louisville & Nashville Railroad Company may be entitled to the rights and privileges granted by the act of Congress aforesaid.

Done at Louisville, Kentucky, this twelfth day of January, 1912. LOUISVILLE & NASHVILLE RAILROAD CO.,

By M. H. SMITH, President.
M. K. GILBERT, Assistant Secretary.

5-1341
Louisville & Nashville Railroad Co.
Incorporated.

253 (On back:) 284. Acceptance by the Louisville & Nashville Railroad Company of the obligations and restrictions of the act of Congress approved July 24, 1866. Date, Jan. 12, 1912. Received Jan. 15, 1912. Address of company, J. H. Ellis, Secy., Louisville, Ky. 5-1341.

254 United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
versus No. 14,528.
Louisville & Nashville R. R. Co.

Defendant's Exhibit 6—Chap. 98, An Act to amend an Act entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," etc.

Note: Same as that copied at page 168 of this transcript.

Defendant's Exhibit 7—Chapter 425, An Act further to amend the Act entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," etc.

Note: Same as that copied at page 172 of this transcript.

Defendant's Exhibit 8—Chapter 568, An Act in relation to Telegraph Companies.

Note: Same as that copied at page 174 of this transcript, except as to the certificate to same—the certificate to Defendant's Exhibit 8 being as follows:

State of New York,
Offices of the Secretary of State.

I have compared the preceding with the original laws on file in this office, and do hereby certify that the same are correct transcripts therefrom, and of the whole of said original laws.

Given under my hand and seal of office, at the City of Albany, this twenty-seventh day of March, in the year one thousand nine hundred and twelve.

JOSE E. PIDGEON,
[Seal] Second Deputy Secy. of State.

Defendant's Exhibit 9—Chap. 97, An Act to change the name of the New York and Mississippi Valley Printing Telegraph Company, filed August 2, 1912.

Note: Same as that copied at page 172 of this transcript.

The remainder of defendant's offer—Exhibit 9—is as follows, to-wit:

255 Consolidated Laws (Laws of 1909, Chapter 219).

Chapter 63.
Transportation Corporation Law.

Article 9.
Telegraph and Telephone Corporations.

Sec. 100. Incorporation: Seven or more persons may become a corporation for the purpose of constructing, owning, using and maintaining a line or lines of electric telegraph or

telephone, wholly within or partly beyond the limits of this State, or for the purpose of owning any interest in any such line or lines, or any grants therefor, by executing, acknowledging and filing a certificate, stating the name of the corporation; its general route and the points to be connected; its capital stock; the number of shares into which it is to be divided; the term of its existence; the number of its directors, not less than seven; the names and residences of the directors for the first year, and the postoffice addresses of the subscribers and the number of shares which each agrees to take in such corporation.

Sec. 101. Extension of Lines: Any such corporation may construct, own, use, and maintain any line of electric telegraph or telephone, not described in its original certificate of incorporataion, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation in constructing, leasing, owning, using and maintaining such line, or hold or own any interest therein, or become lessees thereof, upon filing in the same manner as the original certificate is required to be filed an amended certificate, executed and acknowldged by at least two-thirds of the directors of such corporation, describing the general route of such line or lines, and designating the extreme points connected thereby, and upon procuring the written consent of the persons
256 owning at least two-thirds of the capital stock of such corporation, and such amended certificate shall not be filed until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors of the corporation that such consent has been obtained, which affidavit shall be filed with and be a part of such certificate.

Sec. 102. Construction of Lines: Such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this State, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation cannot agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the condemnation law. Any company or companies organized and incorporated under the laws of this

State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this State, subject to all the provisions of law in reference to such companies not inconsistent with this section; provided that such company shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth. Nothing herein contained shall be so construed as in any way to limit, alter, or affect the provisions or powers relating or granted to telegraph companies heretofore created by special act of the Legislature of this State, except in so far as to confer on any such company the right to lay electrical conductors under ground.

Sec. 103. Transmission of Dispatches: Every such corporation shall receive dispatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and on payment of the usual charges by individuals for transmitting dispatches as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in order in which they are received, and if it neglects or refuses so to do, it shall pay one hundred dollars for every such refusal or neglect to the person or persons sending or desiring to send any such dispatch and entitled to have the same so transmitted, but arrangements may be made with the proprietors or publishers of newspapers for the transmission for publication of intelligence of general and public interest out of its regular order.

Sec. 104. Consolidation of Corporations: Any corporation organized under this article may lease, sell or convey its property, rights, privileges and franchises, or any interest therein, or any part thereof to any telegraph or telephone corporation organized under or created by the laws of this or any other State, and may acquire by purchase, lease or conveyance the property rights, privileges and franchises, or any interest

therein, or part thereof of any such corporation, and may make payments therefor in its own stock, money or property or receive payment therefor in the stock, money or property of the corporation to which the same may be sold, leased or conveyed, but no such lease, sale, purchase or conveyance shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and by the vote or written consent of stockholders owning at least three-fifths of the capital stock given at a meeting of all the stockholders duly called for that purpose.

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258 MOTION OF DEFENDANT TO BE ALLOWED 30 DAYS TIME TO FILE BILLS OF EXCEPTIONS.

Filed Aug. 2, 1912.

United States District Court, Eastern District of Louisiana.

Western Union Telegraph Company
vs. No. 14,528.
Louisville and Nashville Railroad Company.

On motion of Victor Leovy, attorney for defendant, it is ordered that said defendant be and it is allowed thirty days from this date, August 2, 1912, in which to prepare its bills of exceptions.

259 MOTION FOR A NEW TRIAL.

Filed August 9th, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville and Nashville Railroad Company.

On motion of Denegre & Blair and Victor Leovy, of counsel for defendant, and on suggesting to the Court that the verdict herein rendered is contrary to the law and the evidence, and that a new trial should be ordered on that and the following grounds:

(1) That the Court erred in permitting W. H. Courtenay, witness, to be asked by counsel for plaintiff whether, and to testify, over defendant's objection, that, the proposed improvement would benefit the defendant as to use of its remaining property, and the Court erred in stating in the presence of the jury that the matter was one for their consideration; the possibility, practicability, time and expense of defendant's construction of a telegraph line elsewhere being matters of dispute, and the taking of this item into consideration in fixing amount being contrary to Section 1482 of Revised Statutes of Louisiana. Stenographer's report is amended.

(2) That the Court erred in refusing defendant's motion to direct a verdict for reasons therein stated in writing.

(3) That the Court erred in overruling defendant's exceptions of vagueness, prematurity, and no cause of action.

It is ordered that plaintiff be notified to show cause on ..... at .... o'clock A. M. why a new trial should not be granted herein as prayed for.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attys. for Deft.

260 EXHIBIT ATTACHED TO DEFENDANT'S MOTION FOR NEW TRIAL.

W. H. COURTENAY, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Cross-Examination.

By Mr. Fenner:

Q. Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its road, is it not?

Objection.

Mr. Leovy:

I will object to that. I don't know the purpose, but if it is to show a compensative advantage, I submit that it is improper and cannot—

The Court:

That is a matter of opinion as to whether it is an advantage or not.

Mr. Leovy:

That is not my point. I contend that he cannot show compensation if it is an advantage. I can furnish your Honor with authorities—

Mr. Fenner:

It seems to me that it is perfectly legitimate to take into consideration the advantage as well as the disadvantage which results to a railroad from the erection of a telegraph on its right of way.

The Court:

I think it is a matter for the jury to consider.

261 Mr. Leovy:

To which ruling counsel for the defendant reserves a bill of exception on the ground stated to the question when asked.

The Witness:

A. My answer is, it is.

Q. That is necessary for the dispatch of business of the railroad company?

A. Telephone or telegraph for the handling of business; yes, sir.

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262 HEARING ON MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME.

Extract From the Minutes, November Term, 1912.

New Orleans, Saturday, November 23rd, 1912.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

Western Union Telegraph Company

vs. No. 14,528.

Louisville & Nashville Railroad Company.

This cause came on this day to be heard upon the motion for a new trial filed by the defendant herein.

Present: Victor Leovy, of Counsel for Mover.

Present: Chas. P. Fenner, of Counsel for Plaintiff in Suit.

And was argued by counsel for the respective parties.

Whereupon, and on due consideration thereof, it is now ordered by the Court that the said motion for a new trial filed by the defendant herein, be, and the same is hereby overruled, that a new trial be refused, and that the verdict of the jury rendered herein remain undisturbed.

263 MOTION PERMITTING DEFENDANTS TO FILE BILL OF EXCEPTIONS.

Filed November 23, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville and Nashville Railroad Company.

On motion of Denegre and Blair and Victor Leovy, counsel for defendant, and on suggesting to the Court that at the hearing of this cause counsel for defendant presented a motion for thirty days time in which to prepare, settle and file bills of exception, and it was thereupon informally agreed upon between all counsel and the Court that all counsel should have all the time that might be reasonably proper for that purpose; and that no harm should be suffered in that regard by delays to the cause; and considering that thereafter the hearing of the motion for new trial was continued indefinitely on account of absence of opposing counsel; and for good and valid reasons, including necessary absences of the Court, has only lately been refixed; and considering that said motion has not yet been heard nor judgment entered and that the whole matter is still within the control of the Court and the presentation of bills of exception is still timely under the law; and considering the presentation of such bills at this time by said counsel and the consent of opposing counsel in open court, it is ordered that the counsel for defendant be now permitted to present his bills of exception taken at the trial for settlement as of date of trial.

264 BILL OF EXCEPTIONS NO. 1.

Filed November 23rd, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

Bill of Exceptions No. 1.

O. K. C. P. F.

Be it known and remembered that this cause came on for trial in the said Court on the first day of August, 1912, before the Hon. Rufus E. Foster, District Judge, and a jury, duly impaneled. Said trial was continued from day to day up to and including August 2nd, 1912, and on the second day of August, 1912, the evidence on the part of both plaintiff and defendant, including that of the plaintiff in rebuttal, having been concluded, and counsel for the respective parties having so announced, the said defendant did thereupon move the Court to direct a verdict for the defendant, on the following grounds:

1st. The evidence is not legally sufficient or competent as a matter of law to show that the plaintiff is entitled by the laws of the State of its incorporation and of Louisiana and its charter as amended and proceedings thereunder or otherwise to construct or operate a telegraph line in the State of Louisiana.

2nd. The uncontradicted evidence shows that the defendant is not entitled under its charter as amended and the laws of its State of incorporation and of Louisiana of [or] otherwise to construct or operate a line of telegraph in Louisiana.

3rd. The undisputed evidence shows that the proposed expropriation will interfere with the operation of the defendant

as a post road and an interstate common carrier of freight and passengers and as a commercial telegraph line.

4th. The evidence is not legally sufficient or competent to show any necessity for the proposed expropriation at the time of filing suit.

5th. The uncontradicted evidence shows that the defendant proposes to exercise a preferential right to which it is entitled to construct a telegraph line along the route sought by plaintiff, and that the exercise of such right would be prevented by the granting of the prayer of the plaintiff.

Which said motion the Court then and there refused to grant, to which refusal of the Court to grant the aforesaid motion, the said defendant then and there in the presence of the jury, excepted and still excepts, and the said
265 defendant makes part of this, its bill of exceptions, all the evidence, both oral and documentary, taken on behalf of both sides, as well as the statements of counsel and statements, rulings and entire charge of Court, contained in the stenographic report of the trial of the case, filed herewith.

And now, in furtherance of justice and that right may be done, said defendant, the Louisville & Nashville Railroad Company, tenders and presents this bill of exceptions in this cause for the action of the Court aforesaid, and prays that the same may be settled, allowed, signed and sealed by the Court and made part of the record, and the same is accordingly done.

The trial Judge makes all the testimony and evidence, both oral and documentary, offered on the trial of the case, in behalf of the Government, as well as the statements or [of] counsel and statements, rulings and entire charge of Court, contained in the stenographic report of the trial, part of this bill of exceptions, and the trial Judge certifies that this bill of exceptions, prepared by counsel for defendant, Victor Leovy, was duly and seasonably taken and presented, and the same is now allowed, settled, signed and sealed, and ordered filed nunc protunc, as of date August 2nd, 1912.

(Signed) RUFUS E. FOSTER, Judge.

Nov. 29/12.

All the evidence, both oral and documentary, taken on behalf of both sides, made part of Bill of Exceptions No. 1.

Note: Heretofore copied in this transcript from page 66 to page 257, inclusive, thereof.

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266 BILL OF EXCEPTIONS NO. 2.

Filed November 23rd, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

Bill of Exceptions No. 2.

O. K. C. P. F.

Be it known and remembered that this cause came on for trial in the said Court on the first day of August, 1912, before the Hon. Rufus E. Foster, District Judge, and a jury, duly impaneled. Said trial was continued from day to day up to and including August 2nd, 1912, and on the second day of August, 1912, the evidence on the part of both plaintiff and defendant, including that of the plaintiff in rebuttal, having been concluded, and counsel for the respective parties having so announced, and the case having been fully argued to the jury by the counsel for the respective parties and the Judge aforesaid delivered his charge to the jury, and the jury retired to consider its verdict and brought in its verdict on said second day of August, 1912, and during the course of said trial the Western Union Telegraph Company, by its counsel, asked a witness for defendant, W. H. Courtenay, on cross-examination, the following question: "Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its right of way, is it not?" to which the counsel for defendant

then and there objected, stating that if the purpose was to show a compensative advantage, it was improper, and the counsel for plaintiff having stated, in substance, that such was his purpose, the Court declared that it was a matter for the jury to consider, and overruled the objection, to which ruling counsel for defendant then and there, in the presence of
267 the jury, excepted to the ruling and decision of the Court, and still excepts, and defendant makes part of this its bill of exceptions, the said proceedings to be found on pages 55 and 56 of the stenographic report, and all of testimony and evidence and other matters filed with Bill of Exceptions No. 1 herein.

And now, in furtherance of justice and that right may be done, said defendant, through its counsel, tenders and presents this Bill of Exceptions No. 2 for the action of the Court aforesaid, and prays that the same may be settled, allowed, signed and sealed by the Court, and made part of the record, and the same is accordingly done.

The trial Judge makes all the testimony and evidence, both oral and documentary, offered on the trial of the case, statements of counsel and statements, rulings and entire charge of Court, contained in the stenographic report of trial, part of this bill of exceptions, and the trial Judge certifies that this bill of exceptions, prepared by counsel for the said defendant, was duly and seasonably presented and tendered, and the Court has now signed and sealed and ordered the same filed nunc protunc, as of date August 2nd, 1912.

(Signed) RUFUS E. FOSTER, Judge.

Nov. 29/12.

268 BILL OF EXCEPTIONS NO. 3.

Filed November 23rd, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

Bill of Exceptions No. 3.

O. K. C. P. F.

Be it known and remembered that this cause came on for trial in the said Court on the first day of August, 1912, before the Hon. Rufus E. Foster, District Judge, and a jury, duly impaneled. Said trial was continued from day to day up to and including August 2nd, 1912, and on the second day of August, 1912, the evidence on the part of both plaintiff and defendant, including that of the plaintiff in rebuttal, having been concluded, and counsel for the respective parties having so announced, the Court then and there charged the jury, among other things, as follows:

"I charge you that the telegraph company is entitled under the laws of the State of Louisiana and the federal statutes to this right of way."

To which charge of the Court the counsel for defendant then and there duly excepted, in the presence of the jury and before the jury had retired to consider its verdict, and still excepts, and the said defendant, through its counsel, makes part of this, its bill of exceptions, all the evidence, both oral and documentary, and the statements of counsel and statements, rulings and entire charge of Court, contained in the stenographic report of the trial of the cause, the same being annexed to and made of record in Bill of Exceptions No. 1.

And now, in furtherance of justice and that right may be done, the said defendant, through its counsel, tenders and presents this Bill of Exceptions No. 3 for the action of the Court

aforesaid, and prays that the same may be settled,
269 allowed, signed and sealed by the Court, and made part of the record, and the same is accordingly done.

The trial Judge makes all the testimony and evidence, both oral and documentary, used on trial of the cause, the statements of counsel and statements, rulings, and entire charge of Court contained in stenographic report of the trial, part of the bill of exceptions, and the trial Judge certifies that this bill of exceptions, prepared by counsel for defendant, was duly and seasonably prepared by defendant, and the Court has now signed and sealed and ordered the same filed nunc protunc, as of date August 2nd, 1912.

(Signed) RUFUS E. FOSTER, Judge.

Nov. 29/12.

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270 BILL OF EXCEPTIONS NO. 4.

Filed November 23rd, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville and Nashville Railroad Company.

Bill of Exceptions No. 4.

O. K. C. P. F.

This cause came on for hearing before Hon. Rufus E. Foster, Judge of the above entitled Court, and a jury, whereupon, proceedings were had, as shown by the stenographic report, made part of and filed with Bill of Exceptions No. 1, and now made part hereof by reference, and the evidence of both sides having been closed, the jury retired, and after consideration, rendered a verdict for plaintiff and against defendant, whereupon judgment was entered and signed accordingly, to all of which defendant excepted.

And thereafter, before the entry, or signature of judgment, defendant moved for a new trial on the following grounds:

1st. That the Court erred in permitting W. H. Courtenay, witness, to be asked by counsel for plaintiff whether, and to testify, over defendant's objection, that, the proposed improvement would benefit the defendant as to use of its remaining property, and the Court erred in stating in the presence of the jury that the matter was one for their consideration; the possibility, practicability, time and expense of defendant's construction of a telegraph line elsewhere being matters in dispute, and the taking of this item into consideration in fixing amount being contrary to Section 1482 of Revised Statutes of Louisiana.

2nd. That the Court erred in refusing defendant's motion to direct a verdict, for reasons therein stated in writing. (Stenographer's report annexed.)

3rd. The Court erred in overruling defendant's exceptions of vagueness, prematurity, and no cause of action.

After consideration of said motion, the Court overruled same, to which ruling of the Court defendant, by its counsel, then and there excepted.

Whereupon, defendant tenders this, its bill of exceptions, in open court, in presence of opposing counsel to the action of the Court in the various particulars therein set out, and defendant makes part of this, its Bill of Exceptions No. 4 all of testimony and evidence and other matters filed with Bill of Exceptions No. 1 herein.

271 And now, in furtherance of justice and that right may be done, said defendant, through its counsel, tenders and presents this Bill of Exceptions No. 4, for the action of the Court aforesaid, and prays that the same may be settled, allowed, signed and sealed by the Court, and made part of the record, and the same is accordingly done.

The trial Judge makes all the testimony and evidence, both oral and documentary, offered on the trial of the case, statements of counsel and statements, ruling and entire charge of Court, contained in the stenographic report of the trial, part of this bill of exceptions, and the trial Judge certifies that this bill of exceptions prepared by counsel for the said defendant, was duly and seasonably presented and tendered, and the Court has now signed and sealed and ordered the same filed.

(Signed) RUFUS E. FOSTER, Judge.

Nov. 29/12.

272 JUDGMENT.

Extract From the Judgment Book, November Term, 1912.

New Orleans, Saturday, November 23rd, 1912.

Court met pursuant to adjournment.

Present: Hon Rufus E. Foster, Judge.

Western Union Telegraph Company
vs. No. 14529.
Louisville & Nashville Railroad Company.

In this cause heretofore tried before a jury of freeholders, the Court considering the verdict of the jury, and the law and the evidence, and the same being in favor of plaintiff and against defendant, and justifying the relief hereinafter granted, it is ordered, adjudged and decreed that the right of way or easement described in plaintiff's petition herein be, and the same is hereby, condemned and adjudged to plaintiff, the Western Union Telegraph Company, for the purposes and subject to the conditions named in said petition, the same to vest in plaintiff when the amount of the said verdict, to-wit, the sum of six thousand dollars ($6000.00) shall have been paid to the defendant, or the clerk of this Court, in accordance with law, and that plaintiff pay all costs.

The said right of way or easement is more specifically described as follows, to-wit:

The right to construct, maintain and operate a line of telegraph poles and wires along the right of way of the defendant in the Parishes of Orleans and St. Tammany in this State, beginning at a point in the City of New Orleans at the intersection of the property lines at the corner of Elysian Fields Street and Lafayette Street (now North Tonti Street) in square No. 1210, and running thence in an easterly direction through the Parishes of Orleans and St. Tammany to the thread of the stream known as Pearl River, the dividing line between the States of Louisiana and Mississippi, a distance of approximately 25.38 miles, including the bridges belonging to the said defendant traversing the streams known as "Little Bigo-
273 lets" and "Bigodets" respectively, and forming part of defendant's said right of way.

For a distance of approximately two miles from the corner

of Dyess Fields and North Fort Street said line shall extend along the south side of said right of way, at this point it shall cross over the line of track, roadbed and structures of defendants' railroad and for a distance of approximately two miles shall extend along the northern side of said right of way, at this point it shall cross the line of track, roadbed and structures of the defendant's railroad and thence to the bridge, known as the Rigolets bridge, it shall extend along the southern side of defendant's right of way; at this point it shall cross the tracks and along the said bridge extend on the northern side of the track; it shall then cross the track and from the eastern end of the Rigolets bridge to Pearl River shall extend along the southern side of the right of way.

On the bridges crossing the streams known as Little Rigolets and Rigolets, respectively, there shall be three and fifty-four poles, respectively, erected and attached as shown on the map attached to plaintiff's petition and marked Exhibit C.

The poles on which wires are strung shall be located at approximately a distance of 99.33 feet apart and approximately at distances from the center of defendant's main track shown on the profile attached to plaintiff's petition and marked Exhibit E, that is to say, from North Fort Street to Gentilly at an average distance of 66.77 feet; from Gentilly to Milneburg at an average distance of 99.99 feet; from Milneburg to Chef Menteur at an average distance of 99 feet; from Chef Menteur to Lake Catherine at an average distance of 99.99 feet; from Lake Catherine to Rigolets at an average distance of 99.33 feet; from Rigolets to Station at an average distance of 98 feet; from Station to Pearl River at an average distance of 99.99 feet.

The whole of said line shall be so constructed and maintained as not to interfere with the use of its said right of way by the defendant for the purposes of its business of operating a railroad, and if at any time in the future it shall become necessary for the defendant to change the location of its tracks, or to construct new tracks or side tracks, or other structures for the purposes of its said railroad business, and for such purpose to use and occupy the portion of the right of way on which plaintiff's telegraph line may be, then plaintiff shall at its own expense, upon reasonable notice from the defendant, remove its poles, crossarms and wires to

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such other point or points on said right of way as may be reasonably designated by the defendant.

The right of way or easement herein condemned is especially described, and set forth in plaintiff's petition and the exhibits attached thereto, marked Exhibits A, B, and C, respectively, to which reference is made as parts of this judgment.

It is further ordered, adjudged and decreed that all rights, ways, privileges, servitudes and appurtenances connected with the property upon which said line of telegraph is to be erected, and necessary for the erection, operation and maintenance of said line, shall also vest in the plaintiff upon payment by it of the sum aforesaid, and that the plaintiff pay the costs of this suit.

Judgment entered November 23rd, 1912.

Judgment signed November 29, 1912.

(Signed) RUFUS E. FOSTER, Judge.

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275 MOTION AND ORDER ALLOWING DEFENDANT WRIT OF ERROR.

Filed Nov. 29, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville Railroad Company.

On motion of Denegre and Blair and Victor Leovy, attorneys for the Louisville and Nashville Railroad Company, defendant herein, and on suggesting that said defendant is advised and believes that there are errors to its prejudice in the verdict of the jury rendered and recorded herein on August 2, 1912, and in the judgment rendered on said verdict on November ——, 1912, and signed on November ——, 1912, and in the proceedings and trial and refusal of defendant's motion for new trial, all of which will more fully appear from the assignment of errors and bills of exceptions, which are filed with this motion, and on suggesting that said defendant desires

to have the same reviewed by writ of error, to operate as a supersedeas by the United States Circuit Court of Appeals for the Fifth Circuit and desires to give bond so that the same may operate as a supersedeas; and considering said assignment of errors and bills of exception, it is ordered that said defendant be granted a writ of error to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment heretofore entered herein, returnable within 30 days from the date hereof; and upon defendants furnishing bond with good and solvent security in the sum of ten thousand dollars and conditioned as the law directs, the same to operate as a supersedeas.

(Signed) RUFUS E. FOSTER, Judge.
(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attys. for Deft.

New Orleans, November 29, 1912.

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276 DEFENDANT'S ASSIGNMENT OF ERRORS.

Filed Nov. 29th, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14528.
Louisville & Nashville Railroad Company.

Assignment of Errors.

The Louisville & Nashville Railroad Company, defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the case, to-wit:

1st. That the Court erred in permitting W. H. Courtenay, witness, to be asked by counsel for plaintiff, on cross-examination, and to testify, as follows, over defendants' objection:

"By Counsel for Plaintiff:

Q. Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its right of way, is it not?

By Mr. Leovy, Counsel for Defendant:

I will object to that. I don't know the purpose, but if it is to show a compensative advantage, I submit that it is improper and cannot—

The Court:

That is a matter of opinion as to whether it is an advantage or not.

Mr. Leovy:

That is not my point. I contend that he cannot show compensation, if it is an advantage. I can show your Honor authorities—

Mr. Fenner:

It seems to me that it is perfectly legitimate to take into consideration the advantage, as well as the disadvantage, which results to the railroad from the location of a telegraph on its right of way.

The Court:

I think it is a matter for the jury to consider. I will overrule the objection.

Mr. Leovy:

To which ruling counsel for the defendant reserves a bill of exception on the ground stated to the question when asked.

The Witness:

A. My answer is, it is.

By Mr. Fenner:

Q. That is necessary for the dispatching of business of the railroad company?

A. Telephone or telegraph for the handling of the business; yes, sir."

277 Defendant claims in this connection that the possibility, practicability, time and expense of defendant's construction of a telegraph line elsewhere were matters of dispute, and the taking of this item into consideration in fixing amount was contrary to Section 1482 of the Revised Statutes of Louisiana.

2nd. That the Court erred in stating in the proceedings above quoted that the matter was one for the consideration of the jury, the matter being withdrawn from their consideration by Section 1482 of the Revised Statutes of Louisiana.

3rd. That the Court erred in refusing defendants' motion to direct a verdict made at the conclusion of all the evidence on both sides and in the presence of the jury, said refusal being duly accepted to at that time and in the presence of the jury, the following being written reasons assigned for said motion, and now insisted upon:

1st. The evidence is not legally sufficient or competent as a matter of law to show that the plaintiff is entitled by the laws of the State of its incorporation and of Louisiana and its charter as amended and proceedings thereunder or otherwise to construct or operate a telegraph line in the State of Louisiana.

2nd. The uncontradicted evidence shows that the defendant is not entitled under its charter as amended and the laws of its State of incorporation and of Louisiana or otherwise to construct or operate a line of telegraph in Louisiana.

3rd. The undisputed evidence shows that the proposed expropriation will interfere with the operation of the defendant as a post-road and an interstate common carrier of freight and passengers and as a commercial telegraph line.

4th. The evidence is not legally sufficient or competent to show any necessity for the proposed expropriation at the time of filing suit.

5th. The uncontradicted evidence shows that the defendant proposes to exercise a preferential right to which it is en-

titled to construct a telegraph line along the route sought by plaintiff, and that the exercise of such right would be prevented by the granting of the prayer of the plaintiff.

4th. That the Court erred in overruling defendant's exception of vagueness, filed to plaintiff's petition.

5th. That the Court erred in overruling defendant's exception of prematurity to plaintiff's petition.

278 6th. That the Court erred in overruling defendant's exception of no cause of action, filed to plaintiff's petition.

7th. That the Court erred in refusing to charge the jury in accordance with defendant's written request to find a verdict for the defendant.

8th. That the Court erred in charging the jury as follows:

"I charge you that the telegraph company is entitled under the law of the State of Louisiana and the federal statutes to this right of way."

To which charge defendant duly excepted in open court before the jury had retired.

9th. That the Court erred in refusing the motion for new trial herein, based upon all the above grounds.

Wherefore, the said defendant and plaintiff in error prays that the judgment of the said United States District Court for the Eastern District of Louisiana may be reversed.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Defendant.

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279 SUPERSEDEAS BOND.

Filed Nov. 29, 1912.

Know all men by these presents, that we, the Louisville and Nashville Railroad Company, as principal, and National Surety Company, of New York, as surety, are held and firmly

bound unto the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, in the full sum of ten thousand dollars ($10,000.00) to be paid to the said Western Union Telegraph Company, its certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of November, in the year of our Lord, one thousand nine hundred and twelve.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit pending in said Court, between said Western Union Telegraph Company, plaintiff, and said Louisville and Nashville Railroad Company, defendant, No. 14528 of the docket of the District Court of the United States for the Fifth Circuit and Eastern District of Louisiana, a judgment was rendered against the said Louisville and Nashville Railroad Company, and the said Louisville and Nashville Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Western Union Telegraph Company, citing and admonishing it to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such that if the said Louisville and Nashville Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sig.) LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By DENEGRE AND BLAIR, and
VICTOR LEOVY, Attorneys.

(Sig.) NATIONAL SURETY COMPANY,
By WM. A. TOURTAREL,
280 (Seal) Res. Vice President.
J. V. KEATING,
(Seal) Res. Asst. Secretary.

Approved.

(Signed) RUFUS E. FOSTER, Judge.

281 PRAECIPE FOR TRANSCRIPT.

Filed December 18th, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Company
vs. No. 14,528.
Louisville & Nashville R. R. Co.

To H. J. Carter, Esq.,
Clerk, United States District Court, Eastern District of Louisiana, New Orleans, La.

Dear Sir:

In making up the transcript on writ of error in the above entitled and numbered cause you will include the following therein, to-wit:

Proceedings in the Civil District Court, Parish of Orleans, State of Louisiana, Division "D."

Petition.
Exception to Notice.
Exception Maintained.
Supplemental and Amended Petition and Order.
Supplemental and Amended Petition and Order, and Sheriff's Return Thereon.
Exception of Jurisdiction.
Exception of Vagueness, and Five Exhibits.
Exception of No Cause of Action.
Order of Court Revoking Order of June 4th, 1912.

Proceedings in the United States District Court, Eastern District of Louisiana.

Exception of Defendant.
Hearing on Exceptions and Order Overruling Same.
Defendant's Answer.
Case Called, jury impaneled, Hearing and Continuance.
Case Resumed, Further Hearing and Verdict Assessing Property at $6,000.

Testimony Taken During the Trial of the Case.
Exhibits Offered and Filed at the Trial of the Cause.
Motion of Defendant to be Allowed 30 Days Time to File Bills of Exceptions.
Motion for a New Trial, and Exhibits Attached.
Hearing on Motion for New Trial and Order Overruling Same.
Motion and Order Permitting Defendants to File Bill of Exceptions.
Bills of Exceptions Nos. 1, 2, 3 and 4.
Judgment.
Motion and Order Allowing Defendant Writ of Error.
Defendant's Assignment of Errors.
Supersedeas Bond.

New Orleans, La., December 16, 1912.

(Signed) VICTOR LEOVY,
Attorneys for Louisville & Nashville R. R. Co.,
Plaintiff in Error.

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282 STIPULATION.

Filed December 20, 1912.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Western Union Telegraph Co.
vs. No. 14,528
Louisville & Nashville R. R. Co.

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties, that the following maps, offered and filed in the above entitled and numbered cause, to-wit:

Map showing right of way of L. & N. Railroad; also Western Union Telegraph Co., marked Ex. A.;

Tabulation—"Preferred" cross-section paper, 10x10= 1 inch, marked Ex. B.;

Blue print giving detail of Western Union Telegraph Co.'s pole line looking east from New Orleans to Pearl River, marked Ex. C.;

need not be copied into the transcript on writ of error, but that the Clerk of this Court shall transmit the same, in the originals, to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, along with said transcript on writ of error.

(Sig.) VICTOR LEOVY,
Attorneys for Plaintiff in Error.

(Sig.) HOWE, FENNER, SPENCER & COCKE,
Attorneys for Defendant in Error.

New Orleans, La., December 18th, 1912.

United States of America.

District Court of the United States, Eastern District of Louisiana.

Clerk's Office:

I, HENRY J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify, that the foregoing 282 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, and assignment of errors, together with the evidence adduced on the trial of the case of the Western Union Telegraph Company versus Louisville & Nashville Railroad Company, No. 14,528 of the docket of said Court, (made as per the Praecipe for Transcript, copied at page 281 of said Transcript).

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana, this 27th day of December, A. D. 1912.

[Seal]

H. J. CARTER, Clerk.
By W. B. DONOVAN,
Deputy Clerk.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of March 11th, 1913.

No. 2458.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
WESTERN UNION TELEGRAPH COMPANY.

On this day this cause was called and, after argument by Victor Leovy, Esq., for Plaintiff in Error, and Charles Payne Fenner, Esq., for Defendant in Error, was submitted to the Court.

Opinion of the Court.

Filed April 1st, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2458.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

Error to the United States District Court for the Eastern District of Louisiana.

Before Pardee and Shelby, Circuit Judges, and Sheppard, District Judge.

By the COURT:

We find no error in the rulings in the court below, the judgment is therefore affirmed.

Judgment.

Extract from the Minutes of April 1st, 1913.

No. 2458.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
WESTERN UNION TELEGRAPH COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered and adjudged that the Plaintiff in Error, Louisville & Nashville Railroad Company, and the surety on the writ of error bond herein, National Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Rehearing.

Filed April 21, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2458.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
versus
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

Error to the District Court of the United States in and for the Eastern District of Louisiana.

Petition for Rehearing on Behalf of the Louisville and Nashville Railroad Company, Plaintiff in Error.

To the Honorable the United States Circuit Court of Appeals, Fifth Circuit:

The petition of the Louisville and Nashville Railroad Company, plaintiff in error, in the above entitled cause, respectfully shows:

That there is error to the prejudice of petitioner in the decree of this Honorable Court herein rendered on April 1, 1913, affirming the judgment herein and petitioner should be granted a rehearing herein upon the following grounds:

(1) That the charter of the New York and Mississippi Valley Printing Telegraph Company, now the Western Union Telegraph Company, the plaintiff in this proceeding, being of date April, 1851, as amended by resolution of January, 1854, designated the route of the line of telegraph of said company, and said route did not include any point in the State of Louisiana, and the proposed proceedings are plainly beyond the charter powers of said company.

"The charter of a corporation, read in the light of any general laws that are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, not merely voidable, and no action can be maintained upon them in the Courts, and nothing can infuse any vitality into them. Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S., 24, 49; 35 L. Ed., 55; Pittsburg

COPY BOUND TO

&c. R. Co. v. Koekuk &c. Bridge Co., 131 U. S., 371, 384; 33 Ld Ed., 157; St. Louis &c. R. Co. v. Terre Haute &c. R. Co. 145 U. S., 393, 402; 36 L. Ed., 738; Jacksonville &c. R. & Nav. Co. v. Hooper, 160 U. S., 514; 40 L. Ed., 515; California Bank v. Kennedy, 167 U. S., 362, 367; 42 L. Ed., 198; Concord First Nat. Bank v. Hawkins, 174 U. S., 364, 370; 43 L. Ed., 1007, reaffirmed in Shaw v. National German American Bank, 199 U. S., 603; 50 L. Ed., 328; Louisville &c. R. Co. v. Louisville Trust Co., 174 U. S., 552, 567; 43 L. Ed., 1081. See also Hartford Fire Insurance Co. v. Chicago &c. R. Co., 175 U. S., 91, 100; 44 L. Ed., 84; O'Brien v. Wheelock, 184 U. S., 450; 6 L. Ed., 636."

It accordingly follows that the assignments of error 3rd, 7th and 8th were well founded.

(2) The various Acts of the State of New York and the Acts of Congress relied on by the plaintiff herein could have no power, and were not intended, to alter the charter of the corporation made by agreement between its members and constituting a contract between them. Under such construction the New York Legislation would have been contrary to the Constitution of the United States as impairing the obligation of contracts; and such an interpretation of the Federal Act would be contrary to well settled principles of construction.

(3) Even as to the New York Statutes authorizing extensions by companies to places within the charter powers of the companies covered by those acts, no evidence was adduced of any attempt at compliance with these laws, with regard to a line by plaintiff within the State of Louisiana. As shown in brief filed on behalf of petitioner, the Act of 1848 had been amended by the Act of 1851 so as to require written consent of two-thirds of the stockholders to justify extensions (this same provision being a part of the plaintiff's charter) and said act had again been amended in 1853 to authorize extensions wholly within or partly beyond the State when complying with the Act of 1848 (of course, as amended in 1851). The plaintiff company complied with none of the provisions of these acts as amended. To allow it to expropriate in Louisiana would be to allow it to defy the laws of the State of its incorporation and to break the contract made by its charter between its members.

(4) The undisputed evidence shows that the petitioner was and is actually using the route sought to be expropriated. To allow the plaintiff to drive petitioner from that route would be a direct interfer ence with the operation by petitioner of its railroad and a declaration that its right to use its own property is not only not preferential but inferior to that of other companies.

Wherefore petitioner prays that for the reasons herein set out a rehearing may be granted herein and that the decree herein rendered may be set aside and that the judgment of the District Court for the Eastern District of Louisiana herein may be reversed.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Petitioner.

I hereby certify that, in my opinion, the foregoing petition is well founded in law and the petitioner is in my opinion entitled to the relief which it seeks.

(Signed) VICTOR LEGVY,
Counsel for Petitioner.

Order Denying Rehearing.

Extract from the Minutes of May 5th, 1913.

No. 2459.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
WESTERN UNION TELEGRAPH COMPANY.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby denied.

Petition for Writ of Error, and Order.

Filed May 9th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

To the Honorable the Judges of the said Court:

The Louisville & Nashville Railroad Company, plaintiff in error in said above entitled cause, feeling itself aggrieved by the judgment and decree entered on the first day of April, 1913, (rehearing refused May 5th, 1913), comes now by Bruguiere and Blair, and Victor Leovy, its attorneys, and petitions this Court for an order allowing said plaintiff in error, (defendant in the lower Court) to prosecute a writ of error, with supersedeas, to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that citation issue.

And petitioner files and presents herewith its assignment of error and in support to said judgment and proceedings in said cause.

(Signed) GEORGE BRUGUIERE,
(Signed) J. P. BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Petitioner.

Order.

Let a writ of error in the above cause issue as prayed for in the petition, to operate as a supersedeas, upon the petitioner furnishing bond with surety conditioned as the law directs and provides in the sum of two thousand dollars.

(Signed) [illegible]
Circuit Judge.

May 7th, 1910.

Assignment of Errors.

Filed May 9th, 1910.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2459.

Louisville & Nashville Railroad Company, Plaintiff in Error,
vs.
Florence Creek Telephone Company, Defendant in Error.

And now come the Louisville and Nashville Railroad Company, defendant in the United States District Court and plaintiff in error herefrom, and having entered for a writ of error in the final judgment of this Court in the Supreme Court of the United States in the hereby, in connection with its petition for said writ of error assign errors as follows in the record and proceedings herein:

First. Because said United States Circuit Court of Appeals erred in this, that whereas the Western Union Telegraph Company had filed its petition in the Civil District Court for the Parish of Orleans, a Court of the State of Louisiana, praying for the exercise of a right of way for a telegraph line over the property of the petitioner, the Louisville and Nashville Railroad Company, public the State of Louisiana; and said plaintiff had prayed in said petition that it was duly qualified to use its facilities with proceedings and had also proved the requirements of the Act of Congress entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of Same for Postal, Military and Other Purposes," approved July 24th, 1866, and all the powers, privileges, exemptions and obligations conferred and imposed thereby, and said cause having been thereupon removed to the United States District Court for the Eastern District of Louisiana, and the defendant, the present petitioner having been personally and having specifically denied in its answer plaintiff's alleged rights and right authorities and exercise, and said cause having come to trial and the uncontradicted evidence showing that plaintiff was not entitled, without the aid of the authority claimed by it from said

Act of Congress, to construct the proposed line or to expropriate the proposed right of way; and that plaintiff had in fact accepted the benefits of said Act; and the plaintiff contending and the defendant denying (correctly, as it avers) that said Act of Congress extended the charter powers of said plaintiff; and the defendant having on said grounds moved the District Court to direct a verdict for defendant and duly excepted to the refusal of said motion, and verdict and judgment having been thereupon rendered and entered in favor of plaintiff and against defendant, and defendant having properly brought such error (by proper writ of error, bill of exceptions, assignment of error and prayer for reversal) before said United States Circuit Court of Appeals; the said Court of Appeals thereupon erred in that (without stating the reasons therefor) it affirmed said judgment of the District Court and refused to reverse the same and refused, upon petition duly filed by this petitioner, to grant a rehearing, and said judgment is now final except for petitioner's prayer for writ of error.

Second. That the said Circuit Court of Appeals also erred in this, that the pleadings, proceedings and evidence being as above stated the plaintiff averred in its petition that the proposed construction by it would not interfere with the proper and necessary use of defendant's property for railroad purposes, and plaintiff claimed by supplemental petition the beenefit of Act of Congress of July 24, 1866; and defendant in its answer expressly also claimed the benefit of the same Act and averred that the proposed construction would interfere with defendant's business as an interstate common carriers by rail of freight and passengers and as a post-road, and as a duly authorized telegraph Company, and defendant claimed also the protection in these regards of Act of Congress of June 15, 1866; and the uncontradicted evidence showing that the proposed expropriation would in fact interfere with the ordinary use of defendant's property for said purposes and showing defendant's actual use of said property for said purposes, and defendant having so stated as one of the grounds for its said motion to direct a verdict and said motion having been refused (to which defendant duly excepted) and verdict and judgment having been rendered and entered in favor of plaintiff and against defendant, and said error having been duly brought before said Court of Appeals by proper bill of exception, writ of error, assignment of errors and prayer for reversal, said Court of Appeals erred in so construing said Act of Congress as to consider that it permitted interference provided that the same should be compensated for; such construction (no reasons being stated) being the only possible ground for affirmance of said judgment, which was erroneously entered by said Court of Appeals, and for its erroneous refusal to reverse the said judgment and its refusal to grant a rehearing (which was duly prayed for by petitioner) and said erroneous construction of said Act of Congress having been indicated as the view of the Court below in its charge to the jury directing the ascertainment of the compensation for such interference.

Wherefore petitioner prays that said judgment of said United

States Circuit Court of Appeals and said United States District Court may be reversed.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Petitioner.

Bond on Writ of Error.

Filed May 10, 1913.

Know all men by these presents, That we, Louisville and Nashville Railroad Company, as principal, and Charles Janvier as sureties, are held and firmly bound unto Western Union Telegraph Company, a corporation organized under the laws of the State of New York, in the full sum of Two Thousand Dollars ($2,000.00) to be paid to the said Western Union Telegraph Company, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of May in the year of our Lord, one thousand nine hundred and thirteen.

Whereas, lately at a Session of the United States Circuit Court of Appeals for the Fifth Circuit, holding sessions at New Orleans, Louisiana, in a suit pending in said Court, between Louisville and Nashville Railroad Company, Plaintiff in Error, and Western Union Telegraph Company, Defendant in Error, a judgment was rendered against the said Louisville and Nashville Railroad Company and the said Louisville and Nashville Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to said Western Union Telegraph Company citing and admonishing it to be and appear before the Supreme Court of the United States to be holden at Washington, District of Columbia, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Louisville and Nashville Railroad Company shall prosecute said writ of error to effect, then the above obligation to be void; else to remain in full force and virtue.

(Signed) CHARLES JANVIER. [SEAL.]
(Signed) LOUISVILLE & NASHVILLE R. R. CO., [SEAL.]
(Signed) By GEO. DENEGRE, *Att'y.* [SEAL.]

Sealed and delivered in the presence of—

——— ———.
——— ———.
——— ———.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

Personally appeared Charles Janvier, who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in the City of New Orleans, Louisiana, and is worth the full sum of Two Thousand ($2,000.00) Dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) CHARLES JANVIER.

Subscribed and sworn before me this 8th day of May, 1913.

[SEAL.] (Signed) JAMES SIMEON,
Not. Pub.

Approved by—

(Signed) DON A. PARDEE,
Circuit Judge.

Stipulation as to Original Exhibits.

Filed May 19th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2458.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error.
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties that,

Whereas by stipulation filed with the Clerk of the United States District Court for the Eastern District of Louisiana and copied in the transcript filed in the United States Circuit Court of Appeals for the Fifth Circuit on pages 245 and 246 thereof, the following maps and tabulation offered and filed in the above entitled cause in said District Court, to-wit:

Map showing right of way of L. & N. Railroad; also Western Union Telegraph Co., marked Ex. "A";

Tabulation—"Preferred" cross-section paper, 10 x 10=1 inch, marked Ex. "B";

Blue Print giving detail of Western Union Telegraph Co.'s pole line looking east from New Orleans to Pearl River, marked Ex. "C";

were not copied into said transcript, but were transmitted in the original to said United States Circuit Court of Appeals along with said transcript; and,

Whereas said maps and tabulation are bulky and would be expensive to copy, and the contents thereof so far as necessary to the decis

ion of any issue in this cause are sufficiently set forth in the testimony in said transcript;

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties that the said maps and tabulation need not be copied in the transcript on writ of error to the Supreme Court of the United States, and need not be transmitted to said Supreme Court of the United States in the original, and that the transcript on said writ of error to the Supreme Court of the United States shall consist of the printed transcript filed in said Circuit Court of Appeals.

(Signed) VICTOR LEOVY,
Attorney for Louisville and Nashville Railroad Company, Plaintiff in Error.

(Signed) HOWE, FENNER, SPENCER & COCKE,
Attorneys for Western Union Telegraph Company, Defendant in Error.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 247 to 268 next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2458, wherein Louisville and Nashville Railroad Company is plaintiff in error, and Western Union Telegraph Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 246 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals,—the exhibits transmitted to this Court in the original being omitted, in pursuance of the stipulation copied at Page 266 of this transcript.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 20th day of May, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between Louisville and Nashville Railroad Company, plaintiff in error and the Western Union Telegraph Company, defendant in error a manifest error hath happened, to the great damage of the said Louisville and Nashville Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 9th day of May, in the year of our Lord one thousand nine hundred and thirteen.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by

DON A. PARDEE,
Circuit Judge.

[Endorsed:] No. 2458. United States Circuit Court of Appeals. Fifth Circuit. Louisville and Nashville Railroad Company, Plaintiff in Error, vs. Western Union Telegraph Company, Defendant in Error. Writ of Error.

It is hereby certified that a true copy of this Writ is this day lodged in the Clerk's Office for the use of the Defendant in Error, 10th day of May, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA:

The President of the United States to Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to Writ of Error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Louisville and Nashville Railroad Company is plaintiff in error and Western Union Telegraph Company is defendant in error to show cause, if any there be, why the judgment rendered against the said Louisville and Nashville Railroad Company as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 9th day of May in the year of our Lord one thousand nine hundred and thirteen.

DON A. PARDEE,
United States Circuit Judge.

[Endorsed:] R. No. 2458. 3040. United States Circuit Court of Appeals, Fifth Circuit. Louisville and Nashville Railroad Company, Plaintiff in Error, vs. Western Union Telegraph Company, Defendant in Error. Citation.

Received by U. S. Marshal, New Orleans, La., May 10/13.

On this 12th day of May, 1913, before the undersigned authority personally appeared Frank Patten, Deputy U. S. Marshal for the Eastern District of Louisiana, personally known to me as such, who being duly sworn deposes & says that he, affiant did, on the 10th day of May, 1913 serve certified copy of this writ on the Western Union Telegraph Company by handing the same to the Manager thereof William A. Porteous in person in the office of said Company, in the City of New Orleans, Louisiana.

F. PATTEN,
Deputy U. S. Marshal.

Sworn to and subscribed before me on this 12th day of May, 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER
Clerk of the United States Circuit Court of Appeals.

U. S. Circuit Court of Appeals. Filed May 12, 1913. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 23,719. U. S. Circuit Court Appeals, 5th Circuit. Term No. 1144. Louisville & Nashville Railroad Company, plaintiff in error, vs. Western Union Telegraph Company. Filed May 24th, 1913. File No. 23,719.

Supreme Court of the United States, October Term, 1914.

No. 183.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

It is hereby agreed and stipulated by and between the Louisville and Nashville Railroad Company, Plaintiff in Error, and the Western Union Telegraph Company, Defendant in Error, represented by their respective counsel, that the attached certified copy of the petition and bond for removal herein of this cause from the Civil District Court for the Parish of Orleans, Louisiana, to the United States District Court in and for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division, may be filed and used as a part of the record on the hearing of this cause in the Supreme Court of the United States.

January 13, 1915.

HENRY L. STONE,
VICTOR LEOVY,
Counsel for Plaintiff in Error.
CHAS. PAYNE FENNER,
Counsel for Defendant in Error.

Supreme Court of the United States, October Term, 1914.

No. 183.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error.

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January 13, 1915.

DENEGRE, LEOVY & CHAFFE,
Counsel for Plaintiff in Error.
HOWE, FENNER, SPENCER & COCKE,
Counsel for Defendant in Error.

Petition, Order, Bond for Removal & Three Exhibits.

Filed May 31st, 1912.

Petition for Removal to the District Court of the United States for the Eastern District of Louisiana.

Civil District Court, Parish of Orleans, La., Division "D."

No. 100,244.

WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Filed May 31st, 1912.

To the Honorable the Civil District Court in and for the Parish of Orleans, State of Louisiana:

Your petitioner, the Louisville and Nashville Railroad Company respectfully shows to the Court that it is the only defendant in the above styled suit, which is now pending in this Court which is wholly of a civil nature and of which the District Courts of the United States are given original Jurisdiction by the provisions of the Act of Congress, approved March 3rd. 1911, entitled, "An Act to Modify, Revise and Amend the laws relating to the Judiciary", effective January 1st, 1912, and of which the United States District Courts and the State Courts have concurrent jurisdiction; and said suit arises under the Constitution and laws of the United States.

The original petition in said suit was filed on April 12th, 1912 but the only process issued and proceedings taken on said original petition were null and void and were so declared by said Civil District Court and this petitioner filed no pleadings nor appearances to said original petition except a limited appearance by exception expressly limited to the sole purpose of having said proceed-s quashed.

The amended and supplemental petition in said suit, hereafter styled the amended petition, was filed on May 21st, 1912, the process then issued (being the only process in said suit, except the null process above mentioned) being returnable on the 4th day of June, 1912, and the time for pleading or making defense to said amended petition on said original petition as amended, under the laws of Louisiana and the rules of this Court has not yet arrived; that the matter and amount in dispute in this cause exceeds the sum and value and amount of Three Thousand Dollars exclusive of interest and costs and exceeded said sum balance and amount exclusive of interests and costs at the time when the plaintiff's original petition herein was filed and ever since and now.

The plaintiff, Western Union Telegraph Company, of New York, claiming to be a corporation under the laws of the State of New York in its complaint as amended expressly seeks to condemn a

certain right of way over defendant's property therein described as, and in fact, situated in Orleans and St. Tammany Parishes, State of Louisiana, and on and over navigable waters of the United States within said Parishes, which property is within the jurisdiction of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division; and plaintiff expressly seeks to subject said property to its use under the power of eminent domain, invoking the laws of the United States and of the State of Louisiana to enable it to obtain and continue the maintenance and operation of its line over and across defendant's said property which is the asserted purpose of its proceeding herein.

The petition as amended shows on its face that this is a local action in which the plaintiff, Western Union Telegraph Company of New York, seeks to enforce a claim in and upon real estate situated in said Parishes of Orleans and St. Tammany, which are within the New Orleans Division of the Eastern District of Louisiana, the owner of said property, defendant herein, being a non-resident of the State of Louisiana but a corporation and citizen and resident of Kentucky.

The plaintiff, the said Western Union Telegraph Company expressly avers in its amended petition as follows:

"That the plaintiff has duly and formally accepted the provisions of the Act of Congress entitled "An Act to aid in the Construction of Telegraph Lines and to secure to the Government the Use of the same for Postal, Military, and other Purposes" approved July 24th, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby."

That the plaintiff, the said Western Union Telegraph Company, alleges in its original petition that petitioner is engaged in and is carrying on the business of a common carrier by railroad of passengers and freight through various States and in and through the State of Louisiana, and more particularly in and through the Parishes of Orleans and St. Tammany in said State; and said original petition describes a strip of ground or right of way averred therein to belong to this petitioner and to be situated in said two Parishes; and said original petition avers that on said strip of ground this petitioner has constructed and operates a railroad and necessary appurtenances, and that where the line of said railroad crosses navigable streams or bodies of water bridges have been constructed, notably where said railroad crosses the streams known as the "Little Rigolets" and "Rigolets".

This petitioner avers that said petition accordingly shows on its face that said Western Union Telegraph Company is an agency of the Federal Government and that said Government has property rights therein under the provisions of the Act of Congress referred to; and that this petitioner's right of way is a highway of interstate commerce and a post road (under the Statutes of the United States), thus constituting it also an agent of the Federal Government.

The said Western Union Telegraph Company in its said original petition expressly prays that after proceedings, consisting of notice to jurors and the impaneling of a jury to fix and assess the value of the right sought to be expropriated and to determine the damage

to be inflicted thereby, that judgment be rendered expropriating in its favor and against this petitioner the right of use for a telegraph line as described in said petition over the right of way, bridges and property of this petitioner in the form, to the extent, and within the limitations and conditions as described in said petition (being merely subsidiary to and leaving untouched the substantial prayer for the expropriation of said use over said land and bridges within said two Parishes as aforesaid) and said prayer is reiterated in said amended petition.

The said Western Union Telegraph Company in said petition as amended thus claims a right in and to this petitioner's highway of commerce or post road and seeks to take from this petitioner and appropriate to its own use, under and by virtue of the said Act of Congress of the United States of America, the said property right of this petitioner, which proceedings is a suit at law of a civil nature arising under the Constitution and laws of the United States within the meaning of the second section of the Act of Congress of March 3rd, 1875 (18 Stat. at L. 470, ch. 137), as amended by the Acts of Congress of March 3rd, 1887 (24 Stat. at L., 552, Chap. 373), and August 13th, 1888 (25 Stat. at L. 433, Chap. 866), and as reclassified and continued in the Judiciary Act approved March 3rd, 1911, and effective January 1st, 1912, Chap. 2 Sec. 24, and Chap. 3, Sec. 28; that the defendant's right of way was made a highway of interstate Commerce by Act of Congress of June 15, 1866, and a post road by Act- of Congress of 1838 and 1872; and that in addition to being thus constituted a highway of Interstate Commerce for the carriage of Freight and passengers, the defendant, Louisville and Nashville Railroad Company, has also become a telegraph company by amendment to its charter under the Constitution and laws of Kentucky, and by virtue of its acceptance, which it has made in writing, of the obligations and restrictions of the Act of Congress of July 24th, 1866, with all the rights, privileges and immunities contained therein, and that by virtue of the Act of Congress of June 23, 1869, Chapter 35 (21 Stat. at L. 31) it is authorized to transmit intelligence not only for its railroad purposes, but for the United States Government and for the general public, and that while plaintiff claims and asserts certain rights against the property of defendant under the Constitution and laws of the United States, this defendant also claims certain rights, privileges and immunities under the same provisions of the Constitution and under the same laws, of the United States.

Petitioner shows that there is involved in this suit a controversy arising under the constitution and laws of the United States, in that the plaintiff, Western Union Telegraph Company is seeking to condemn under the State laws and under the Acts of Congress, an easement for maintaining and operating its telegraph lines upon and along the said right of way of the defendant which necessarily involves the constitution of Clause 3, Section 8 of Article 1 of the Constitution of the United States, which confers upon Congress the exclusive right to regulate commerce among the several States; and also involves the construction of Acts of Congress passed in pursu-

ance of the Commerce Clause of the Constitution to which laws the plaintiff's complaint as amended shows defendant is subject; and under the averments of the complaint as amended this controversy would especially involve and its result would be dependent upon the construction of the Acts of Congress of June 15th 1866, providing that every railroad company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon its road, boats, bridges and ferries, all passengers, troops government supplies, mails, freight and property on their way from any State to another, and to receive compensation and to connect with lines in all other States so as to form continuous lines for the transportation of same to the place of destination; that the amended petition in this proceeding, construed in the light of its advertisement, also involves the construction of the Act of Congress of July 24th, 1866, relating to telegraphs, the provisions of which the plaintiff avers in its amended complaint it has accepted and under which it asserts certain rights; and to meet its requirements and restrictions certain alleged "offers and consents" are made in the original complaint, so that the correct decision of this controversy will depend upon the construction of said Acts of Congress; that the correct decision of this controversy will also depend upon the construction of the post road Acts of Congress to the provisions of which the plaintiff, in its complaint, shows that the defendant railroad company's highway is subject; that the assertion of the right by the plaintiff in its complaint to condemn any portion of the defendant's highway of interstate commerce, either under the Statutes of the United States or under the laws of Louisiana, involves not only the construction of the Commerce Clause of the Constitution of the United States but also of the various Acts of Congress passed in pursuance thereof and with respect to post roads, and involves a construction of the effect of the Act of Congress of July 24th, 1866, upon the right of the plaintiff to proceed under State authority and the effect of one act upon the other, and the construction of the Acts of Congress when asserted by the plaintiff, jointly with the Louisiana Statute, upon the correct decision of which will depend the rights of the parties in and to this suit.

Petitioner desires to remove this suit before the trial thereof into the next District Court of the United States to be held in and for the Eastern District of Louisiana, at New Orleans, and tenders herewith a bond, with good and solvent surety, for its entering into said District Court of the United States within the time required by law, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that the said bond and surety may be approved and accepted; that this Honorable Court proceed no further herein except to make the order *to* removal and cause the record to be certified and removed to said District Court of the United States; that this suit may be removed into the next District Court of the United States to be held in the Eastern District of Louisiana,

pursuant to the statutes of the United States in such cases made and provided.

The appearance in this case is special and for the purpose of this removal only.

(Signed) LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Petitioner.*
By CHAS. W. WOODWARD, *Agent and Attorney.*
By GEO. DENEGRE, *Agent and Attorney.*

Affidavit.

STATE OF LOUISIANA,
Parish of Orleans.

Comes Charles Woodward, and makes oath and says that he is agent and attorney for the defendant petitioner herein, and that the foregoing petition is true of his own knowledge, except as to matters stated therein as to information and belief, and as to those he believes it to be true; and that the President, Vice-President and other general officers of said defendant are absent from Louisiana.

(Signed) CHAS. WOODWARD.

Sworn to and subscribed before me on this, the 29th day of May, 1902.

[SEAL.] (Signed) FELIX J. PUIG,
Notary Public.

Affidavit.

STATE OF LOUISIANA,
Parish of Orleans, La.:

Comes Charles Woodward and makes oath and says that he is agent and attorney for the defendant petitioner herein, and that the foregoing petition is true of his own knowledge, except as to matters stated therein as to information and belief and as to those he believes to be true, and that the President, Vice-President and other general officers of said defendant are absent from Louisiana.

(Signed) CHAS. WOODWARD.

Sworn to and subscribed before me this 29th day of May, 1902.

(Signed) FELIX J. PUIG,
Notary Public.

State of Louisiana,
Parish of Orleans, ss:

Civil District Court, Parish of Orleans, Louisiana.

Western Union Telegraph Company, *Plaintiff*,
vs.
Louisville & Nashville Railroad Company, *Defendant*.

Bond of Defendant, Louisville & Nashville Railroad Company, for Removal of Cause to the District Court of the United States for the Eastern District of Louisiana.

Know all men by these presents:

That the Louisville and Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, as principal, and Fidelity & Deposit Co. of Maryland, a corporation of the State of Maryland, as surety, are bound and held unto the Western Union Telegraph Company, a corporation of the State of New York, the plaintiff in the above entitled cause, its successors and assigns, in the sum of Five Hundred Dollars, Gold, for the payment whereof well and truly to be made unto the said plaintiff, its successors and assigns, we bind ourselves, our successors and heirs, jointly and severally, by these presents.

Upon condition, nevertheless, that whereas the said Louisville & Nashville Railroad Company, defendant in the above entitled cause, has filed its petition in the Civil District Court, for the Parish of Orleans, State of Louisiana, for the removal of a certain cause therein pending, wherein the said Western Union Telegraph Company is plaintiff and the said Louisville and Nashville Railroad Company is defendant, to the District Court of the United States in and for the Eastern District of Louisiana.

Now, if the said Louisville & Nashville Railroad Company shall enter into the said District Court of the United States within thirty days from the filing of said petition for removal or within such other time as the said court may allow, and shall also enter and file in said court, on the first day of the session thereof, or within such further time as the said court may allow, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court if said court shall hold that said suit was removed improperly or without sufficient cause, then the obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof the said Louisville & Nashville Railroad Company has caused these presents to be signed by Charles Maslin, its attorney in fact and at law, and the said Fidelity & Deposit Co. of Maryland has caused its corporate seal to be hereunto affixed by its duly authorized agent this 9th day of May, A. D. 1894.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.
By CHAS. MASLIN,
(Signed) Attorney in Fact.

STATE OF LOUISIANA,
Parish of Orleans, ss:

Felix J. Puig, the surety named in the foregoing bond, being first duly sworn, deposes and says:

That he is a resident and householder of said Parish and State that he is the same person whose name is signed to the foregoing bond; and that he is the owner of real estate situated in the Parish and State aforesaid of the value of more than Five Hundred ($500.00) Dollars, named as the penalty therein and is worth said sum, over and above all his just debts and liabilities, exclusive of property which is exempt from execution.

(Signed) FELIX J. PUIG.

Subscribed and sworn to by said Felix J. Puig, before me Edgar Grima, a Notary Public in and for the Parish and State aforesaid, fully authorized and empowered by the laws of said State to administer oaths, as witnesses my hand and official seal hereto affixed this 28th day of May, A. D., 1912.

[SEAL.] (Signed) EDGAR GRIMA,
Notary Public, Parish of Orleans,
State of Louisiana.

STATE OF LOUISIANA,
Parish of Orleans, ss:

Victor Leovy one of the attorneys of the petitioner, being duly sworn, deposes and says, that written notice of the foregoing petition and bond for removal was given to the plaintiff's attorney of record, Mr. Bernard J. Meyer, prior to filing the same, to wit: on the 28th day of May 1912. the original of said notice being attached hereto as part hereof, marked N. This May 28th, 1912.

(Signed) VICTOR LEOVY,
Attorney for Petitioner.

Sworn to and subscribed before me, at New Orleans, Louisiana, on this 28th. day of May, 1912.

[SEAL.] (Signed) FELIX J. PUIG,
Notary Public.

Civil District Court, Division "D", Parish of Orleans, Louisiana.

No. 100,244.

WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

To the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, plaintiff in above suit, through Messrs. Howe, Fenner, Spencer and Cocke, and B. J. Mayer, its attorneys of record herein:

Please take notice that on Friday, May 31st, 1912, at eleven o'clock A. M., the Louisville and Nashville Railroad Company will file in the Civil District Court for the Parish of Orleans, the petition for removal, annexed affidavit, bond and annexed affidavit, and proposed order, of all of which papers copies are handed you herewith; and will file at the same time a copy of this notice with affidavit as to service.

May 28th 1912.

(Signed) DENEGRE & BLAIR,
VICTOR LEOVY,
Attorneys for Louisville & Nashville Railroad Company.

Victor Leovy, being duly sworn, deposes and says: That on Tuesday, May 28th 1912, at 3.25 P. M. he served notice, of which foregoing is a true copy, together with true copies of the documents therein described, upon Mr. Bernard J. Meyer one of the said attorneys for said Western Union Telegraph Company, in the office of said Attorneys in New Orleans, Louisiana, by handing said notice and copies to said Mr. Bernard J. Meyer in person.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, La., this 28th day of May, 1912.

[SEAL.] (Signed) FELIX J. PUIG,
Notary Public.

Civil District Court, Parish of Orleans, La., Division "D."

No. 100,244.

WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

To the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, plaintiff in above suit, through Messrs. Howe, Fenner, Spencer and Cocke, and B. J. Mayer, its attorneys of record herein:

Please take notice that before the filing of the petition for removal of which copy was handed you, it will be amended by adding on the fifth line from the top of page two (2), after the words "interest and costs" the words "and exceeded said sum, value and amount, exclusive of interest and costs at the time when the plaintiff's original petition herein was filed and ever since and now":

As so amended said petition will then be re-verified and filed.

(Signed) DENEGRE & BLAIR,
" VICTOR LEOVY,
Attorneys for Louisville & Nashville Railroad Company.

Victor Leovy being duly sworn deposes and says that he served the original notice of which the foregoing is a copy on Mr. Chas. P. Fenner, one of the attorneys of record for the above named Western Union Telegraph Company by handing said original notice to the said Mr. Chas. P. Fenner in his office at New Orleans, Louisiana, at 9:30 A. M., on this, the 31st day of May, A. D. 1912.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this 31st day of May A. D., 1912.

[SEAL.] (Signed) FELIX J. PUIG,
Notary Public.

Order of Removal.

Civil District Court, Parish of Orleans, Louisiana.

No. 100,244.

WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

The defendant herein having within the time provided by law filed its petition for removal in this cause to the District Court of the United States for the Eastern District of Louisiana, New Orleans

Division, and having at the same time offered its bond in the sum of Five Hundred Dollars, with Felix J. Puig good and sufficient surety, pursuant to the Statutes and conditioned according to law; now, therefore, this Court does hereby accept and approve said bond and accept said petition, and it is ordered that this cause be removed for trial to the next District Court of the United States for the Eastern District of Louisiana, New Orleans Division, pursuant to the statutes of the United States, and that all other proceedings in this Court be stayed.

The order for removal in this case is refused.

N. O. June 4th 1912.

(Signed) PORTER PARKER, *Judge.*

United States of America, District Court of the United States, Eastern District of Louisiana.

CLERK'S OFFICE:

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify the above and foregoing to be a true Extract from the Transcript of Removal from the Civil District Court for the Parish of Orleans, in the matter entitled "Western Union Telegraph Company versus Louisville & Nashville Railroad Company," No. 14,528 of the Docket of this Court, on file in this office.

Witness my hand, and the seal of the said Court, at the City of New Orleans, Louisiana, this 14th day of January, A. D., 1915.

H. J. CARTER, *Clerk.*

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

[10 cent Internal Revenue Stamp, cancelled.]

[Endorsed:] 183/23,719. No. 14528. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Western Union Telegraph Company vs. Louisville and Nashville Railroad Company. Extract from Transcript of Removal from Civil District Court for the Parish of Orleans.

[Endorsed:] File No. 23,719. Supreme Court U. S. October term, 1914. Term No. 183. Louisville & Nashville Railroad Company, Pl'ff in Error, vs. Western Union Telegraph Company. Stipulation of counsel and addition to record. Filed January 27, 1915.

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Office Supreme Court, U. S.
FILED
JAN 18 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

versus

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

VICTOR LEOVY,
GEORGE DENEGRE,
HENRY L. STONE,
Attorneys for Plaintiff in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Plaintiff in Error,*

versus

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - *Defendant in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

This suit was instituted on April 12, 1912, by the defendant in error, the Western Union Telegraph Company, a corporation organized and existing under the laws of the State of New York (hereinafter called the Telegraph Company), in the Civil District Court for the Parish of Orleans, against the plaintiff in error, the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of

Kentucky (hereinafter called the Railroad Company), to expropriate or condemn for the construction, operation, maintenance and repair of the Telegraph Company's line, a right of way on, over and along the Railroad Company's right of way and bridges spanning certain navigable streams or bodies of water in the State of Louisiana, the length thereof in the Parish of Orleans being 28.93 miles, and in the Parish of St. Tammany 6.45 miles, or a total distance of 35.38 miles, beginning at a named point in the city of New Orleans and extending thence easterly to the thread of the stream known as Pearl River, the dividing line between the States of Louisiana and Mississippi.

As alleged in the Telegraph Company's petition, on the said right of way, varying in width from 60 to 100 feet, which the Railroad Company had acquired and then owned, a railroad had been constructed, and was being operated by the Railroad Company, in carrying on the business of a common carrier of passengers and freight in and through various States, including Louisiana. At various places on said right of way, as further alleged in the Telegraph Company's petition, the Railroad Company had constructed necessary appurtenances, consisting of side tracks, station houses, depots and section houses, and, where the line of said railroad crosses navigable streams or bodies of water, bridges have been constructed, notably where said railroad crosses the streams known as the "Little Rigolets" and "Rigolets."

Many years ago, as said petition discloses, the Telegraph Company, with the consent of the Railroad Com-

pany, constructed and had ever since maintained a line of telegraph poles and wires and other appurtenances thereto over and along said strip of ground or right of way and bridges of the Railroad Company; but it is stated that the right so to maintain said telegraph line would expire and terminate on August 17, 1912; and, although the Telegraph Company had endeavored and offered to agree with the Railroad Company as to the value of the use and servitude enjoyed by the Telegraph Company on said strip of ground or right of way and the bridges aforesaid for the purpose of maintaining said line of telegraph, the Railroad Company had refused to agree with the Telegraph Company as to the terms and conditions upon which the latter might continue to enjoy the said use or servitude, and had refused to permit the enjoyment thereof by it after the expiration of the then existing contract between the two companies on August 17, 1912.

The Telegraph Company averred in its petition that it was necessary for it to have the right to erect and maintain its telegraph poles, wires and appurtenances along and parallel to the line of railroad and upon said right of way and bridges belonging to the Railroad Company, the location of said poles, wires and appurtenances constituting its telegraph line being shown on a map and profile and made parts of said petition, marked Exhibits A and B, respectively, which were intended to describe the location of the telegraph line then being operated, and are not copied into the transcript of the record. In other words, the portion of the Railroad Company's

said right of way sought to be expropriated was that then occupied and used by the Telegraph Company under contract.

The petition states the Telegraph Company did not seek to acquire the fee to any of the lands or bridges included in said right of way, or the right to use the same for any other purpose than to erect poles with cross-arms thereon and to string wires for use in the transmission of intelligence by magnetic telegraph, the poles being not less than 30 feet long, nor less than 20 inches in diameter at the base, and, except the poles on said bridges, to be set in the ground to a depth of not less than 6 feet, and approximately 91.65 feet apart, or not exceeding 40 to the mile, all to be securely and properly braced, and the cross-arms to be 8 or 10 feet in length, extending from 4 to 5 feet on each side of said poles near the top. On the bridges crossing the streams aforesaid the poles were to be fastened and attached as shown on a sketch filed and made part of the petition, marked Exhibit C. This sketch is not copied into the transcript of the record. The width of the portion of said right of way sought to be expropriated was no where stated, nor was the location or number of the brace-poles and guy-wires to hold the upright poles in position set forth.

The expropriation sought not only the right to erect and operate a telegraph line, as aforesaid, but the right to maintain and repair the poles, cross-arms, wires and appurtenances as might from time to time be necessary, including the right to enter upon the whole or any part of the Railroad Company's said right of way, or the

right of ingress and egress, for those purposes, without let or hindrance.

Among other averments of the petition is the following, which we shall have occasion to refer to further on (R., 6):

> Petitioner further stipulates and agrees that if at any time in the future, after the erection of its said poles, cross-arms and wires, or after its acquisition in this proceeding of the right to maintain its poles, cross-arms and wires as presently constructed, it should become reasonably necessary for the said defendant to change the location of its tracks or to construct new tracks or side tracks where the same do not now exist, and for such purpose to use and occupy that portion of the said right of way on which petitioner's poles are, or may be set, petitioner will, at its own expense, upon reasonable notice from the defendant, remove the said poles, cross-arms and wires to such other point or points on the said defendant's right of way as may be reasonably necessary in order not to obstruct the use by the said defendant of its property.
>
> Petitioner recognizes fully the dominant right of the defendant in the said right of way and bridges, and seeks in this proceeding to condemn merely an easement or servitude over the same for the construction, operation, maintenance and repair of its telegraph lines, the said easement or servitude to be used now and in the future in such way as not to interfere with the proper and necessary use of the same by the said defendant for railroad purposes.

The Telegraph Company in its said petition averred (R., 4):

> That petitioner being a corporation organized for the purpose of transmitting intelligence by magnetic telegraph is, under and by virtue of the (statutes of the) State of Louisiana, authorized and empowered to expropriate the right to construct and maintain its lines along and parallel to any railroad in the State, when such right is necessary for the construction, working, operating and maintaining of its telegraph line, and when it can not secure such right by consent, contract or agreement upon such reasonable terms, provided, that the ordinary use of such railroad be not thereby obstructed.

In its prayer the Telegraph Company asked the court to direct the clerk to give notice to the Railroad Company, in accordance with law (accompanied by a copy of the petition and the order rendered thereon), of the time a jury of freeholders would be impaneled to fix and assess the value of the right sought to be expropriated, and to determine the damage, if any, the Railroad Company would sustain in the premises, and, after due proceedings, for judgment expropriating the right of way, bridges and property of the latter in the form, to the extent and within the limitations described in said petition.

After the first process issued on the original petition was quashed (R., 9), the Telegraph Company filed its amended petition on May 21, 1912, setting up its acceptance of and relying upon the provisions of the Act of Congress entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,"

approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby. (R., 10.)

Subsequently the Railroad Company filed its petition and bond for a removal of the case to the District Court of the United States for the Eastern District of Louisiana, New Orleans Division (not copied into the transcript of the record), which the State Court at first refused to allow, but later (June 17, 1912), *on suggestion of counsel for the Telegraph Company,* the order refusing such removal was revoked and an order was entered removing the case. (R., 47.)

Meantime, however (on June 4, 1912), counsel for the Railroad Company, appearing solely for that purpose, excepted to the jurisdiction of the State Court, and, under protest, and compulsion, and also under a qualified entry of appearance, filed exceptions, in the nature of a demurrer, to the petition, on certain grounds, and prayed for a dismissal of the suit. (R., 13-15.)

At the same time, in connection with said exceptions, counsel for the Railroad Company filed the affidavit of J. H. Ellis, its secretary, and, as such, custodian of the original contracts between the Railroad Company and the Telegraph Company; and also filed said contracts, dated May 31, 1876, May 14, 1880, and June 18, 1884, respectively, together with the original notice given by the Telegraph Company to the Railroad Company, dated August 11, 1911, received by M. H. Smith, President of the latter, August 17, 1911, terminating the last mentioned contract on August 17, 1912. (R., 15-46.)

Again (on June 15, 1912), under protest, counsel for the Railroad Company excepted to the petition as amended because it disclosed no cause of action, and, among other grounds, assigned the following (R., 46-47):

> And exceptor specially assigns as ground for said exception that this court having ruled that the Federal Statutes referred to in the petition give no right or cause of action under the Federal decisions, exceptor now says that, under the decisions of the Supreme Court of Louisiana, the Louisiana statutes are insufficient without Federal legislation to give the relief sought, especially as to the crossing of defendant's railroad, occurring five times on the plan annexed to the petition; the Louisiana statutes authorizing expropriation for right of way along and over waters, but not along and parallel to railroads.

The transcript on the removal was filed in the said District Court of the United States, together with original Exhibits A, B and C with the petition, on June 29, 1912 (R., 46), and on the same date, in the latter court, the Railroad Company filed additional exceptions, in the nature of a demurrer to the petition and amended petition, and prayed a dismissal thereof. (R., 49-50.)

These exceptions were overruled on August 1, 1912, and thereupon the Railroad Company filed its answer. (R., 51-62.) The defenses set up and relied on in this answer may be summarized as follows:

1. A traverse of all and singular the allegations of the petition, save as might be thereinafter specifically admitted, but specially denying all the Telegraph Com-

pany's alleged charter and rights, althorities and capacities.

2. Admitting that it is the owner of the strip of land and right of way, of which the plan annexed to the petition is a correct representation so far as it goes, but alleging that said plan is incomplete in not showing in detail the various embankments, bridges, trestles, culverts, drains and other works, upon which, and in clearing its right of way through the swamps, it had expended large sums of money; that said bridges, being over navigable streams in several instances, where it had been compelled to construct draw-bridges over the waters known as Rigolets and Chef Menteur, and the alleged right of the Telegraph Company to expropriate for its proposed route is denied, and especially as to crossing the Railroad Company's tracks and going upon its bridges over navigable waters.

3. The Railroad Company is authorized by its charter to operate a railroad over its right of way, and for that purpose to construct, maintain and operate its own telegraph wires and other facilities incident thereto, and also to engage in a commercial telegraph business; and that it is a post-road and common carrier engaged in interstate commerce.

4. A denial that the Telegraph Company is or ever has been authorized under its charter or any amendment thereto, or by any law of the State of New York to construct, maintain or operate any telegraph line in the State of Louisiana, or elsewhere, save as thereinafter expressly stated. Copies of the articles of incorporation

of the Telegraph Company under the laws of New York, the amendments thereto, the certificates of incorporation required to be filed with the Secretary of State, and the corporate action of the board of directors and stockholders of the Telegraph Company, relied on to show a lack of power in the latter under its charter to acquire and hold property, or to construct, operate and maintain a telegraph line of the State of Louisiana, are set forth, filed and made part of the answer. (R., 52, 53.)

5. The line of poles and wires as proposed will interfere with and hamper the ordinary use of the Railroad Company's property, and the operation of its railroad.

6. That the provisions, conditions and arrangement of a contract can not lawfully be put in a judgment or expropriation, even to the extent proposed in the petition, or to any extent, although the pretended proposition to that effect contained in the petition, especially as to a movable right of way, shows that the interference would be serious and in time destructive, and the interference with the Railroad Company's telegraph business, and especially with its business along the route it has selected, would be destructive from the beginning; all contrary to the Acts of Congress of June 15, 1866, and July 24, 1866, and Article I, Section 8, paragraphs 3 and 7, of the Constitution of the United States.

7. That prior to the filing of the petition there had existed divers agreements between the two companies, all of which were on June 18, 1884, merged into a new contract, in which it was provided that the Telegraph Company should have the right to erect along the line of

the Railroad Company's right of way a telegraph line, and in the construction thereof to erect posts, string wires, put cross-arms thereon, and do other things necessary for the effective carrying on of a telegraph business; that it was further provided therein that the Railroad Company should have the right to place its wires upon the poles of the Telegraph Company for the purpose of conducting its railroad business, and have the use of said wires in connection with the joint use of the operator sending and receiving messages over both the wires of the Telegraph Company and the Railroad Company; and that under said arrangement both companies had used the posts and wires for their respective businesses and were then so using the same. That under the terms of said contract, it was to remain in effect for 25 years from June 18 (in fact, July 1), 1884, "and thereafter until the expiration of one year after written notice shall have been given by one of the parties to the other of a desire or intention to terminate the same." That the Telegraph Company had given such notice, and said contract would terminate on August 17, 1912; that in said contract it is not provided, upon the expiration thereof, that said poles and cross-arms erected under said contract shall remain the property of the Telegraph Company, and the Railroad Company was advised, believed and averred that, upon said expiration, the said property would be the property of the Railroad Company; and that a condemnation by the Telegraph Company, under its petition, would result, not in the condemnation of a right of way, as alleged to be sought by it, but in (the condemna-

tion of) the poles and cross-arms and the use of the same, not justified or authorized either by the laws of the United States or of the State of Louisiana.

8. The Railroad Company, under said contract, had strung its wires for the communication by telegraph of messages necessary in conducting its business of operating trains, and transporting persons and freight, and was then using the same for that purpose, and interference with the use of such wires and telegraphic communications for the Railroad Company's said purposes would be an interference with the ordinary travel and use of its railroad in Louisiana, and was directly prohibited by the statute of that State, under which the Telegraph Company claimed the right to the condemnation sought.

9. That under the provisions of said contract the Railroad Company selected the points at which the poles should be placed for the putting thereon of cross-arms and stringing of wires, for the joint use of the two companies, in which selection the Railroad Company chose the best, most convenient, least expensive and most proper place for the erection, maintenance and operation of a telegraph line for its own business; and if the Telegraph Company be allowed to condemn said location and appropriate the same for its own exclusive use, then the Railroad Company would be deprived not only of a portion of its right of way, but also of that portion thereof which is best, most convenient, most practicable and least expensive in the construction, maintenance and operation of its own line of telegraph; and that such condemnation

could not be had under or by virtue of the Acts of Congress or the statute of the State of Louisiana.

10. That the Telegraph Company, in its petition, had located and sought to condemn, for its purposes, the land then occupied by its poles, cross-arms and other instrumentalities, which location was the one which had been appropriated by the Railroad Company for its telegraph lines, and the condemnation thereof by the Telegraph Company would interfere with the ordinary travel and use of the railroad of the Railroad Company; and that no condemnation could be had of any part of said right of way, since no other location but that then occupied by said line of telegraph was described or sought in the petition.

11. A traverse of the averment in the petition that the Telegraph Company had endeavored in good faith to procure its consent to the occupation of the spaces then occupied for the operation of a telegraph line, with an allegation that the Railroad Company had always been and was then willing to continue to permit the Telegraph Company to use its lines as they then existed, upon the terms and conditions set forth in the said contract between them, or upon any reasonable and just terms acceptable to both parties, but the Telegraph Company being unwilling to concede such terms, desired to use the process of condemnation for the purpose of coercing the Railroad Company into making an unjust and inequitable contract.

12. That the Railroad Company has not only the present right to string its wires upon the poles erected

by the Telegraph Company under said contract, and to use the same in its business, but it has procured an amendment to its charter, of which a copy was filed as part of the answer, by which it is authorized to construct, maintain and operate a telegraph line for commercial purposes as a common carrier of telegraphic messages, and had filed with the Postmaster General of the United States its acceptance of all the provisions of the Act of Congress, approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," a copy of which acceptance was filed as part of the answer.

That in pursuance of said charter amendment it had caused to be located its line for the purpose of telegraphic transmission of messages, both relating to its own business and those sent for the public for hire, at the identical place and line then occupied by the poles erected by the Telegraph Company and theretofore and then used jointly by the two companies, which location of its line had been made not only in what it was advised was a due exercise of its legal right, but in the exercise of due prudence, care and proper economic consideration, the same being the best place upon its right of way for the construction, maintenance and operation of a telegraph line.

That there was no authority under the statutes of the United States or of the State of Louisiana for one public telegraph company, being a common carrier of telegraphic messages for the public, to condemn the property

or the line or any of the instrumentalities of another telegraph company or common carrier of telegraphic messages, and the Telegraph Company, therefore, had no right to condemn the location sought in its petition.

13. The Telegraph Company seeks to condemn a right of way for its poles at each and every point where its poles are now located along the Railroad Company's right of way; and should such condemnation be had and the Telegraph Company be placed in exclusive occupation of such space, the Railroad Company, in carrying on its business as a railroad, will be compelled, for the transportation of telegraphic messages, to construct, maintain and operate an independent telegraph line between its stations, and at various places along the line of its railroad, by virtue of natural and artificial conditions, it would be impossible for it to construct its own line on its own right of way, and the result, therefore, of the condemnation as sought would be to allow the Telegraph Company to monopolize the right of way of the Railroad Company, which would be required to construct, in considerable part, its own line off its own right of way, and such result would be illegal under the statutes invoked by the Telegraph Company.

14. The growing demands of the Interstate Commerce Commission and the State Commission, and of the public, are such that, in the near future, the Railroad Company will be required to make constructions upon its right of way inconsistent with the presence thereon of a telegraph line of the Telegraph Company, distinct and independent of the telegraph line of the Railroad Com-

pany, necessary for the latter's own uses as a railroad, and under the amendment of its charter aforesaid, for the service of the public.

That the demands of business, the expedition of passenger trains, the safety of both passenger and freight trains, required the Railroad Company's railroads to be double-tracked, which it had commenced, and such double-tracking had progressed upon its main line to a considerable extent, and it would, in all probability, also double-track a portion of its lines in Louisiana in the near future. That its said right of way is not broad enough to accommodate, consistently with safety and the ordinary use and travel of its railroad, the said double-tracks, its side tracks, its own line of telegraph, and, in addition thereto, the telegraph line of the Telegraph Company.

That said commissions, public sentiment and the safety of persons transported on various railroads throughout the United States, are insistent upon the establishment of a system of block signals or other equivalent devices for the operation of trains. This would require the construction of such system upon one side of the Railroad Company's tracks, and all of that side would be necessary for the use thereof, so that it would be impracticable to place the telegraph lines of the Telegraph Company upon the same side with said signal system, the construction of which would relegate to the other side not only the side tracks, but also the telegraph line of the Railroad Company used in its railroad business and for the public, and, if it were practicable, the line of the Telegraph Company also.

Thus the construction of the line as sought by the Telegraph Company would interfere with the ordinary travel and use of the Railroad Company's lines.

15. A denial that there is any necessity for the proposed expropriation and an averment that the Telegraph Company can and does telegraph over telephone lines between the same places by virtue of a contract and community or identity of interests.

16. The quantity of land sought to be occupied or used by the Telegraph Company exceeds that which is reasonably necessary for the purposes intended by that company and within the meaning of the laws relative to the forced taking of property, and in the event the Railroad Company's objections and exceptions shall be overruled or the jury be allowed to determine the value of the land to be expropriated, it desires that the jury shall also determine the extent of the land over which the Telegraph Company may exercise the forced expropriation, always subject to the decision of the Supreme Court on appeal.

17. In support of its plea that the length of the cross-arms shown on the exhibits with the Telegraph Company's petition is excessive, and by diminishing the length of such cross-arms one-third, as could be reasonably and practicably done, the Railroad Company states the width of the right of way expropriated, if any, by the Telegraph Company could be substantially reduced, and its value and the damages to the Railroad Company correspondingly reduced, and that if such cross-arms so reduced proved incapable of sustaining the wires neces-

sary for the business of the Telegraph Company, additional lower or higher cross-arms could be used of the same diminished length.

In this connection the Railroad Company further alleged that the cross-arms, as at present existing, hold wires upon which are carried the business necessary for the Railroad Company, which business will be eliminated, and the commercial business to be done by the Telegraph Company and that which can reasonably be anticipated will be very greatly reduced by the commercial telegraph to be operated by the Railroad Company, even if the line for such telegraph should be illegally forced from the location that has been chosen for it, as above set forth.

Furthermore, the plan proposed by the Telegraph Company proposed more poles by one-third than would be reasonably necessary, within the meaning of said laws, and the proposed expropriation would be useless, as the poles would be in the midst of the Railroad Company's right of way and the Telegraph Company could not legally or practicably have access to the same. That in many places the Railroad Company's right of way is taken up by trestles, etc., and the only available place for the location of poles and wires is that where the wires are now strung, especially because of the encroachment of waters on or near the right of way at many points, and because the location referred to has more solid ground and is more free from obstruction by ditches and otherwise.

In the light of these and other reasons to be shown at the hearing the Railroad Company submitted that besides its absolute right to have the first choice in the selection of its own right of way for the location of its own poles, wires and telegraph system, such location is not only reasonable, but in many places essential.

18. The main reason inspiring the Telegraph Company to select as a location the one described (although indefinitely as to metes and bounds) in the petition is a reason of economy based upon the identical reasons that prompted the Railroad Company to select it, and as between the owner of the property in need and the Telegraph Company, the owner should have the first consideration by the court.

The Railroad Company's right of way (exclusive of bridges), about thirty-five miles long, of which the use is proposed to be taken by the Telegraph Company, which, including supports, would be 25 feet wide, was acquired, cleared and drained and put in order at a very heavy expense; that the swamp through which it passes was at the time of the original construction heavily wooded in parts and in many parts passed over deep marshes in the nature of quick-sand, requiring unusually heavy expenses in filling and otherwise in order to bring the whole into shape and keep it in shape for use; that the land over which the right of way is constructed is in part in the inhabited portion of the city of New Orleans and of considerable value, and taking into consideration the value of the land and the spaces necessary for supports or braces to poles and the expense of putting the same in

condition for use is not less than twenty thousand ($20,000) dollars. That its bridges, which the Telegraph Company proposes to utilize, were constructed and are maintained over deep streams and in a country subject to storms and overflows, requiring very substantial and expensive construction, long posts and other expensive items, that the total cost of said bridges exceeded four hundred thousand ($400,000) dollars, and that the value of the use which the Telegraph Company proposes to make of the same is not less than forty thousand ($40,000) dollars.

20. That if the plan proposed by the Telegraph Company is carried out, the Railroad Company will be damaged in the respects above shown, in the operation of its railroad and telegraph system, and will be damaged especially by being restricted in the operation of its railroad and its telegraph line for its trains and the general conduct of its business for itself and commercially; that it will be obstructed in the construction and use of passing tracks and other side tracks necessary for its business, depots and other buildings and sites therefor, and in the construction of double tracks, repair and reconstruction of its bridges and buildings and in the maintenance and operation of its property generally; that these damages and obstructions will be brought about by the presence of the Telegraph Company's poles and wires in the places needed for the location of the Railroad Company's railroad and telegraph structures and facilities, and by the falling of the Telegraph Company's poles and wires, and the danger of fire and obstruction from crews

employed by the Telegraph Company working on the right of way and on bridges, increasing the Railroad Company's danger and responsibility, and by increased labor rendered necessary in clearing and maintaining the right of way and its property generally; also by interference with the view of engineers and with the construction and operation of the necessary railroad signal and prospective block systems; that owing to the mode of construction necessarily employed in making its right of way, and the character of the country through which it passes, and the presence of a borrow-pit or canal running along the side of the track, the solid ground available for telegraph or railroad purposes is exceedingly limited, and this fact greatly increases the value of the right sought by the Telegraph Company and the damages that will result from the expropriation thereof. That the Railroad Company's expensive bridges are situated in localities where they are greatly exposed to violent storms, which have occasionally brought about the reconstruction of all or a part thereof; that in each of the cases where destruction has taken place the wind's pressure against said bridges has been substantially increased by the presence of telegraph wires thereon.

In the prayer to its answer the Railroad Company asked that judgment be rendered in its favor and against the Telegraph Company, finally dismissing the latter's suit, and in the event that a judgment be rendered in favor of the Telegraph Company that the amount to be paid by the Telegraph Company to it be fixed at the sum of seventy thousand ($70,000) dollars.

No replication was filed by the Telegraph Company.

On August 1, 1912, a jury was impaneled to try the issues made by the pleadings and the trial was proceeded with. (R., 63.)

On the following day, after the conclusion of all the testimony heard on behalf of the parties, counsel for the Railroad Company moved the court to direct a verdict in its favor, which the court overruled, to which ruling the Railroad Company reserved an exception. Thereupon, after hearing the arguments of counsel and receiving a charge from the court, the jury returned a verdict as follows:

> We of the jury find for the plaintiff in accordance with the prayer of its petition and assess the damages at the sum of six thousand dollars ($6,000.00).

All the testimony introduced by the parties, both documentary and oral, will be found in the transcript of the record. (R., 65-143.)

At the conclusion of the testimony the court delivered to the jury the following charge (R., 143, 144):

> Gentlemen:
>
> In this case your sole duty is to fix the damages that the Western Union Telegraph Company shall pay to the Louisville & Nashville Railroad Company. *I charge you that the Telegraph Company is entitled under the law of the State of Louisiana and the Federal Statutes, to this right of way.* It is not necessary for you to determine for how much width of the line this right of way shall extend, but, of course,

that is a matter for you to consider in arriving at the damages.

Now, you are the sole judges of the facts in the case and the sole arbiters of the amount of damages. You may draw upon your own experience as men of affairs as well as determining that amount from the evidence you have heard, and you should take into consideration every element that will amount to the damage of the railroad—the question of inconvenience, the question of added expense, any question of that sort such as you have heard testified to before you.

I will give you the charge requested by the plaintiff, which puts in legal terms the matters you may consider: You should award such a sum per mile as will in your opinion, under the evidence adduced, fairly represent: First, the saving in expense, if any, to the plaintiff company resulting from improvements, such as clearing, filling, bridges, etc., made by the defendant upon the portion of the right of way on which the plaintiff's telegraph line is to be located. (Of course, you understand the plaintiff is the Telegraph Company.) Second, the extent to which the value of its right of way to the defendant for railroad purposes will be diminished by the location thereon of plaintiff's telegraph line. In this connection, however, you will not be justified in taking into account added convenience or saving of expense resulting to the plaintiff merely from the fact of the location of its telegraph line on defendant's right of way in close proximity to the railroad, or the diminution in value of defendant's property for other possible uses than railroad uses or for additional railroad uses.

Now, gentlemen, of course, it is intended to convey by that last paragraph that you must not take into consideration as an element of profit to the railroad that the Telegraph Company can conveniently use that right of way for getting out its poles, but you may, however, take into consideration any inconvenience that may result by the Telegraph Company's use of the railroad's right of way for its purposes. You may also consider that the Railroad Company, for railroad use, may want to erect this railroad signal system talked about, and they would have a right to own a telegraph line. These are all matters for you to consider. After you have considered all these things, then apply your knowledge of business and human affairs, considering the different angles and probabilities of the case, and then fix such damages as you think will compensate the railroad for the use of this right of way by the Telegraph Company.

You will elect your own foreman and write your verdict upon the back of the petition or on a separate paper and attach it to the petition.

Following the charge, the following colloquy took place between counsel for the Railroad Company, the court and one of the jurors (R., 144, 145):

Mr. Leovy: I understand Your Honor has refused my request for a charge in favor of the defendant. I except to that. I will also ask Your Honor to direct the attention of the jury to the fact that we are entitled to reasonable compensation, taking into consideration our expenditures for improvements.

The Court: I will give you that charge, gentlemen, as Mr. Leovy has stated it.

A Juror: Can we not render our verdict in addition to giving money damages that the Telegraph Company shall give the Railroad Company an arm?

The Court: No, that is not part of your duties. You can only fix the damages.

Mr. Leovy: I must reserve a bill to that charge. I think the jury has a right to impose one condition as well as another; that they should render certain services whether they offer to do so or not.

The Court: You may be right, but I don't think so. My understanding is that all the jury can do is to render a verdict for so much damages.

Mr. Leovy: I think the jury has a right under the Louisiana Statutes to decide what shall be taken, and I think it has a right to impose this condition. I will reserve a bill.

The Court: Gentlemen, of course, if you find for the plaintiff, you must express your verdict in a certain sum. Your verdict will simply be "for the defendant," if you so find.

Mr. Leovy: I will also except to the charge that the plaintiff has a right to expropriate.

On the trial the Telegraph Company introduced certain documentary evidence on the issue raised concerning its powers under its charter and the laws of New York to acquire, maintain and operate telegraph lines in the State of Louisiana, as follows:

1. Exhibit marked "Plaintiff One" (R., 146-177), consisting of a certified copy of the "Laws of the State of New York by and under which the Western Union

Telegraph Company is incorporated and organized, together with the certificates executed and filed as required by those laws."

2. Exhibit marked "Plaintiff 2" (R., 177-179), being a copy of the "Certificate of incorporation and articles of association of the New York and Mississippi Valley Printing Telegraph Co."

3. Exhibit marked "Plaintiff 3" (R., 180-186), consisting of the articles of the "New York and Mississippi Valley Printing Telegraph Company and certificate of incorporation."

4. Exhibit marked "Plaintiff's Exhibit No. 4" (R., 186-187), being the acceptance by the Telegraph Company of the Act of Congress approved July 24, 1866, filed with the Postmaster General and the latter's certificate thereof.

5. Exhibit marked "Plaintiff's Exhibit No. 5" (R., 187-191), showing the appointment by the Telegraph Company of an agent in the State of Louisiana on whom process might be served in any legal proceeding, and the filing of a certificate thereof in the office of the Secretary of State of Louisiana, January 10, 1906, agreeable to Article 264 of the Constitution and in compliance with Act No. 54 of 1904 of the Legislature of that State.

6. Exhibit marked "Plaintiff's Exhibit No. 6" (R., 191-194), showing a like appointment by the Railroad Company and the filing of a like certificate by that company in the office of the Secretary of State of Louisiana on August 11, 1908.

7. Exhibit marked "Plaintiff's Exh. No. 7" (R., 194-195), being a communication from the attorneys of the Telegraph Company to the Railroad Company, dated March 16, 1912, in which it is stated that the Telegraph Company's right to maintain its line of telegraph poles and wires and other appurtenances over the right of way of the Railroad Company under the then existing charter would expire on August 17, 1912, and giving notice that it desired to acquire the right after the expiration of said contract right to erect and maintain its telegraph lines on and along the Railroad Company's right of way where the same was then located, and offering to pay therefor $5.00 per mile, and stating if no response was heard from the Railroad Company prior to March 25th (1912) the same would be considered as having been rejected, and the Telegraph Company would take proceedings to expropriate the right in question.

The documentary evidence introduced on the trial by the Railroad Company consisted of the following:

1. "Defendant's Exhibit No. 1" (R., 196-208), being "An Act to Charter the Louisville & Nashville Railroad Company, approved March 5, 1850."

2. "Exhibit marked Defendant 2" (R., 208-210), being copy of "Extracts from the minutes of a meeting of the board of directors of the Louisville & Nashville Railroad Company held at the office of the company in New York City, on Thursday, December 21, 1911, at which a quorum was present," showing the adoption of the amendment to the charter of the Railroad Company in accordance with the laws of the State of Kentucky au-

thorizing and empowering that company to exercise all the powers, rights, privileges and franchises then or which might thereafter be conferred on a telegraph company or telephone company by the laws of the latter State or which might be obtained thereunder, and to acquire, construct, establish, maintain and operate in said State and in other States of the United States, in accordance with the laws of such other States, a telegraph system or telephone system, or both, for the purpose of conducting its own business as a common carrier by railroad and the business and service of a common carrier by telegraph or telephone, or both, including the power and authority to construct, establish, maintain and operate conduits, subways or manholes, wires, poles or other equipments, on, over, along, under or through its present railroad right of way, or such right of way as it might thereafter lawfully acquire by purchase or otherwise in the State of Kentucky and in other States of the United States, etc., in accordance with the laws thereof, and authorizing and directing the president of that company to execute the written acceptance by the Railroad Company of the provisions in the Act of Congress, approved July 24, 1866, and the restrictions and obligations thereof and to file the same with the Postmaster General of the United States.

3. "Defendant's Exhibit No. 3" (R., 210-218), consisting of a certified copy of the amendments to the charter of the Railroad Company, adopted November 2, 1911, empowering and authorizing the Railroad Company to exercise all the rights, powers, privileges and franchises

of a telegraph company or telephone company in the State of Kentucky, or in other States of the United States, in accordance with the laws thereof.

4. "Defendant's Exhibit 4" (R., 218, 219), consisting of the certificate of the clerk of the County Court of Jefferson County, Ky., showing the amendments aforesaid had been duly recorded in his office on November 23, 1911.

5. "Defendant's Exhibit 5" (R., 219, 220), being the acceptance by the Railroad Company of the provisions of the Act of Congress, approved July 24, 1866, and the certificate of the Postmaster General of the United States, showing the filing of said acceptance in his office on January 15, 1912.

6. "Defendant's Exhibit 6" (R., 220), consisting of a copy of "Chapter 98, An Act to amend an Act entitled 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' " etc., being the same Act introduced as evidence by the Telegraph Company and copied into the transcript at page 150.

7. "Defendant's Exhibit 7" (R., 221), consisting of "Chapter 425, An Act further to amend the Act entitled 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' " etc., being the same Act introduced as evidence by the Telegraph Company and copied into the transcript at pages 154, 155.

8. "Defendant's Exhibit 8" (R., 221), being "Chapter 568, An Act in relation to Telegraph Companies," being the same Act introduced as evidence by the Telegraph Company and copied into the transcript at pages 156, 157.

9. "Defendant's Exhibit 9" (R., 221), consisting in part of "Chapter 97, An Act to change the name of the New York and Mississippi Valley Printing Telegraph Company," being the same Act introduced as evidence by the Telegraph Company and copied into the transcript at pages 153, 154. The remainder of said Exhibit No. 9, consisting of copies of the "Consolidated Laws of New York of 1909, Chapter 219, Chapter 63, Transportation Corporation Law, Article 9, Telegraph and Telephone Corporations, copied into the transcript at pages 221-224.

The Telegraph Company introduced four witnesses who testified at the trial, viz.: G. B. Straughn, J. D. Hilbert, T. P. Cummings and C. A. Tessier, Jr. (R., 68-104, 138-143.)

The Railroad Company introduced five witnesses who testified at the trial, viz.: W. H. Courtenay, W. G. Brown, A. R. Fugina, Allen H. Snellen and Charles Marshall. (R., 104-136.)

At the conclusion of the trial on August 2, 1912, the Railroad Company on motion of its counsel was allowed thirty days from that date in which to prepare and file its bill of exceptions. (R., 224.) On August 9, 1912, the Railroad Company, by its counsel, filed its motion for a new trial on the following grounds:

> (1) That the court erred in permitting W. H. Courtenay, witness, to be asked by counsel for plaintiff whether, and to testify, over defendant's objection, that the proposed improvement would benefit the defendant as to use of its remaining property, and the court erred in stating in the presence of the

jury that the matter was one for their consideration; the possibility, practicability, time and expense of defendant's construction of a telegraph line elsewhere being matters of dispute, and the taking of this item into consideration in fixing amount being contrary to Section 1482 of Revised Statutes of Louisiana.

(2) That the court erred in refusing defendant's motion to direct a verdict for reasons therein stated in writing.

(3) That the court erred in overruling defendant's exceptions of vagueness, prematurity, and no cause of action.

Attached to this motion for a new trial was an exhibit showing the alleged erroneous ruling of the court in the cross-examination of W. H. Courtenay as a witness, as follows:

W. H. Courtenay, a witness examined on behalf of the defendant, after being duly sworn, testified as follows:

Cross-Examination.

By Mr. Fenner:

Q. Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its road, is it not?

Objection.

Mr. Leovy:

I will object to that. I don't know the purpose, but if it is to show a compensative advantage, I submit that it is improper and can not—

The Court:

That is a matter of opinion as to whether it is an advantage or not.

Mr. Leovy:

That is not my point. I contend that he can not show compensation if it is an advantage. I can furnish your Honor with authorities—

Mr. Fenner:

It seems to me that it is perfectly legitimate to take into consideration the advantage as well as the disadvantage which results to a railroad from the erection of a telegraph on its right of way.

The Court:

I think it is a matter for the jury to consider.

Mr. Leovy:

To which ruling counsel for the defendant reserves a bill of exception on the ground stated to the question when asked.

The Witness:

A. My answer is, it is.

Q. That is necessary for the dispatch of business of the railroad company?

A. A telephone or telegraph for the handling of business; yes, sir.

On November 23, 1912, after the argument of counsel for the respective parties the court overruled said motion for a new trial. (R., 227.)

On the same day, however, and before the action of the court on the motion for a new trial the court upon agreement between all counsel enlarged the time for the presentation and filing of bills of exception by counsel for the Railroad Company (R., 228). Thereupon the

Railroad Company by its counsel tendered its several bills of exception Nos. 1, 2, 3 and 4, which were allowed to be filed *nunc pro tunc* and signed by the judge of the court on November 29, 1912. (R., 229-235.)

All of the evidence, both oral and documentary, taken on behalf of both sides was made part of bill of exception No. 1. (R., 230, 231.) On the same day the court entered as of November 23, 1912, the following judgment on the verdict of the jury. (R., 236-238):

> In this cause heretofore tried before a jury of freeholders, the court considering the verdict of the jury, and the law and the evidence, and the same being in favor of plaintiff and against defendant, and justifying the relief hereinafter granted, it is ordered, adjudged and decreed that the right of way or easement described in plaintiff's petition herein be, and the same is hereby, condemned and adjudged to plaintiff, the Western Union Telegraph Company, for the purposes and subject to the conditions named in said petition, the same to vest in plaintiff when the amount of the said verdict, to-wit, the sum of six thousand dollars ($6,000) shall have been paid to the defendant, or the clerk of this court, in accordance with the law, and that plaintiff pay all costs.
>
> The said right of way or easement is more specifically described as follows, to-wit:
>
> The right to construct, maintain and operate a line of telegraph poles and wires along the right of way of the defendant in the Parishes of Orleans and St. Tammany in this State, beginning at a point in the city of New Orleans at the intersection of the

property lines at the corner of Elysian Fields Street and Laforce Street (now North Tonti Street) in square No. 1210, and running thence in an easterly direction through the Parishes of Orleans and St. Tammany to thread of the stream known as Pearl River, the dividing line between the States of Louisiana and Mississippi, a distance of approximately 35.38 miles, including the bridges belonging to the said defendant traversing the streams known as "Little Rigolets" and "Rigolets" respectively, and forming part of defendant's said right of way.

For a distance of approximately two miles from the corner of Elysian Fields and North Tonti Street said line shall extend along the south side of said right of way, at this point it shall cross over the line of track, roadbed and structures of defendant's railroad and for a distance of approximately two miles shall extend along the northern side of said right of way, at this point it shall recross the line of track, roadbed and structures of the defendant's railroad and thence to the bridge, known as the Rigolets bridge, it shall extend along the southern side of defendant's right of way; at this point it shall recross the tracks and along the said bridge extend on the northern side of the track; it shall then recross the track and from the eastern end of the Rigolets bridge to Pearl River shall extend along the southern side of the right of way.

On the bridges crossing the streams known as Little Rigolets and Rigolets, respectively, there shall be three and thirty-four poles, respectively, erected and attached as shown on the sketch attached to plaintiff's petition and marked Exhibit C.

The poles on which wires are strung shall be located at approximately a distance of 91.65 feet apart and approximately at distances from the center of defendant's main track shown on the profile attached to plaintiff's petition and marked Exhibit B, that is to say, from North Tonti Street to Gentilly, at an average distance of 46.57 feet; from Gentilly to Michaud at an average distance of 29.50 feet; from Michaud to Chef Menteur at an average distance of 32 feet; from Chef Menteur to Lake Catherine at an average distance of 32.13 feet; from Lake Catherine to Rigolets at an average distance of 33.13 feet; from Rigolets to Dunbar at an average distance of 28 feet; from Dunbar to Pearl River at an average distance of 32.25 feet.

The whole of said line shall be so constructed and maintained as not to interfere with the use of its said right of way by the defendant for the purposes of its business of operating a railroad, and if at any time in the future it shall become necessary for the defendant to change the location of its tracks, or to construct new tracks or side tracks, or other structures for the purposes of its said railroad business, and for such purpose to use and occupy the portion of the right of way on which plaintiff's telegraph line may be, then plaintiff shall at its own expense, upon reasonable notice from the defendant, remove its poles, cross-arms and wires to such other point or points on said right of way as may be reasonably designated by the defendant.

The right of way or easement herein condemned is especially described, and set forth in plaintiff's petition and the exhibits attached thereto, marked

Exhibits A, B and C, respectively, to which reference is made as parts of this judgment.

It is further ordered, adjudged and decreed that all rights, ways, privileges, servitudes and appurtenances connected with the property upon which said line of telegraph is to be erected, and necessary for the erection, operation and maintenance of said line, shall also vest in the plaintiff upon payment by it of the sum aforesaid, and that the plaintiff pay the costs of this suit.

On petition and motion filed November 29, 1912, of the Railroad Company's counsel the District Court granted a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit for the review of said judgment. (R., 238-239.)

In connection with this petition for a writ of error counsel for the Railroad Company filed the following assignment of errors (R., 239-242):

1st. That the court erred in permitting W. H. Courtenay, witness, to be asked by counsel for plaintiff, on cross-examination, and to testify, as follows, over defendant's objection:

By counsel for plaintiff:

Q. Unless a railroad company has a telegraph line of its own, it is, in a certain aspect at least, an advantage to a railroad company to have a telegraph line along its right of way, is it not?

By Mr. Leovy, counsel for defendant:

I will object to that. I don't know the purpose, but if it is to show a compensative damage, I submit that it is improper and can not—

The Court:

That is a matter of opinion as to whether it is an advantage or not.

Mr. Leovy:

That is not my point. I contend that he can not show compensation, if it is an advantage. I can show your Honor authorities—

Mr. Fenner:

It seems to me that it is perfectly legitimate to take into consideration the advantage, as well as the disadvantage, which results to the railroad from the location of a telegraph on its right of way.

The Court:

I think it is a matter for the jury to consider. I will overrule the objection.

Mr. Leovy:

To which ruling counsel for the defendant reserves a bill of exception on the ground stated to the question when asked.

The Witness:

A. My answer is, it is.

By Mr. Fenner:

Q. That is necessary for the dispatching of business of the Railroad Company?

A. Telephone or telegraph for the handling of the business; yes, sir.

Defendant claims in this connection that the possibility, practicability, time and expense of defendant's construction of a telegraph line elsewhere were matters of dispute, and the taking of this item into consideration in fixing amount was contrary to Section 1482 of the Revised Statutes of Louisiana.

2d. That the court erred in stating in the proceedings above quoted that the matter was one for

the consideration of the jury, the matter being withdrawn from their consideration by Section 1482 of the Revised Statutes of Louisiana.

3d. That the court erred in refusing defendant's motion to direct a verdict made at the conclusion of all the evidence on both sides and in the presence of the jury, said refusal being duly accepted to at that time and in the presence of the jury, the following being written reasons assigned for said motion, and now insisted upon:

(1) The evidence is not legally sufficient or competent as a matter of law to show that the plaintiff is entitled by the laws of the State of its incorporation and of Louisiana and its charter as amended and proceedings thereunder or otherwise to construct or operate a telegraph line in the State of Louisiana.

(2) The uncontradicted evidence shows that the defendant is not entitled under its charter as amended and the laws of its State of incorporation and of Louisiana or otherwise to construct or operate a line of telegraph in Louisiana.

(3) The undisputed evidence shows that the proposed expropriation will interfere with the operation of the defendant as a post-road and an interstate common carrier of freight and passengers and as a commercial telegraph line.

(4) The evidence is not legally sufficient or competent to show any necessity for the proposed expropriation at the time of filing suit.

(5) The uncontradicted evidence shows that the defendant proposes to exercise a preferential right to which it is entitled to construct a telegraph line along the route sought by plaintiff, and that the

exercise of such right would be prevented by the granting of the prayer of the plaintiff.

4th. That the court erred in overruling defendant's exception of vagueness, filed to plaintiff's petition.

5th. That the court erred in overruling defendant's exception of prematurity to plaintiff's petition.

6th. That the court erred in overruling defendant's exception of no cause of action, filed to plaintiff's petition.

7th. That the court erred in refusing to charge the jury in accordance with the defendant's written request to find a verdict for the defendant.

8th. That the court erred in charging the jury as follows:

> "I charge you that the Telegraph Company is entitled under the law of the State of Louisiana and the Federal Statutes to this right of way."

To which charge defendant duly excepted in open court before the jury had retired.

9th. The court erred in refusing the motion for new trial herein, based upon all the above grounds.

Wherefore, the said defendant and plaintiff in error prays that the judgment of the said United States District Court for the Eastern District of Louisiana may be reversed.

The transcript of the record on said writ of error was made and duly certified in accordance with the precipe therefor (R., 244-245), and the stipulation of counsel for both parties agreeing to the omission therefrom of certain exhibits, the originals of which were transmitted, with said transcript, to the United States Circuit Court of Appeals for the Fifth Circuit. (R., 246-248.)

In the latter court the case was called and argued on March 11, 1913, and on April 1, 1913, the judgment of the District Court was affirmed, without the delivery of an opinion. (R., 247-248.)

Thereafter on April 21, 1913, the Railroad Company filed its petition for rehearing. (R., 248-249.)

On May 5, 1913, this petition was denied by the court below, no opinion being delivered. (R., 250.)

Afterward on May 8, 1913, the Railroad Company filed its petition for the allowance of a writ of error with supersedeas to this court, which was granted. (R., 250-251.) Said petition for a writ of error was accompanied by the following assignment of errors filed in support thereof (R., 251-253):

> And now comes the Louisville & Nashville Railroad Company, defendant in the United States District Court and plaintiff in error therefrom, and having prayed for a writ of error to the final judgment of this court to the Supreme Court of the United States, it does hereby, in connection with its petition for such writ of error, assign errors as follows in the record and proceedings herein:
>
> First. Because said United States Circuit Court of Appeals erred in this, that whereas the Western Union Telegraph Company had filed its petition in the Civil District Court for the Parish of Orleans, a court of the State of Louisiana, praying for the expropriation of a right of way for a telegraph line over the property of this petitioner, the Louisville & Nashville Railroad Company, within the State of Louisiana; and said plaintiff had averred in said petition that it was duly qualified by law to institute

such proceedings and had also averred (by supplemental petition) that it had duly and formally accepted the provisions of the Act of Congress entitled 'An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of Same for Postal, Military and Other Purposes,' approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and said cause having been thereupon removed to the United States District Court for the Eastern District of Louisiana, and the defendant, the present petitioner, having then answered, and having specifically denied in its answer plaintiff's alleged charter and rights, authorities and capacities, and said cause having come to trial and the uncontradicted evidence showing that plaintiff was not entitled, without the aid of the authority claimed by it from said Act of Congress, to construct the proposed line or to expropriate the proposed right of way; and that plaintiff had in fact accepted the benefits of said Act; and the plaintiff contending and the defendant denying (correctly as it avers) that said Act of Congress extended the charter powers of said plaintiff; and the defendant having on said grounds moved the District Court to direct a verdict for defendant and duly excepted to the refusal of said motion, and verdict and judgment having been thereupon rendered and entered in favor of plaintiff and against defendant, and defendant having properly brought such error (by proper writ of error, bill of exceptions, assignment of error and prayer for reversal) before said United States Circuit Court of Appeals; the said Court of Appeals thereupon erred in that (without stating the reasons therefor)

it affirmed said judgment of the District Court and refused to reverse the same and refused, upon petition duly filed by this petitioner, to grant a rehearing, and said judgment is now final except for petitioner's prayer for writ of error.

Second. That the said Circuit Court of Appeals also erred in this, that the pleadings, proceedings and evidence being as above stated the plaintiff averred in its petition that the proposed construction by it would not interfere with the proper and necessary use of defendant's property for railroad purposes, and plaintiff claimed by supplemental petition the benefit of Act of Congress of July 24, 1866; and defendant in its answer expressly also claimed the benefit of the same Act and averred that the proposed construction would interfere with defendant's business as an interstate common carrier by rail of freight and passengers and as a post-road, and as a duly authorized telegraph company, and defendant claimed also the protection in these regards of Act of Congress of June 15, 1866; and the uncontradicted evidence showing that the proposed expropriation would in fact interfere with the ordinary use of defendant's property for said purposes and showing defendant's actual use of said property for said purposes, and defendant having so stated as one of the grounds for its said motion to direct a verdict, and said motion having been refused (to which defendant duly excepted) and verdict and judgment having been rendered and entered in favor of plaintiff and against defendant, and said error having been duly brought before said Court of Appeals by proper bill of exception, writ of error, assignment of errors and prayer for reversal, said

Court of Appeals erred in so construing said Act of Congress as to consider that it permitted interference provided that the same should be compensated for; such construction (no reasons being stated) being the only possible ground for affirmance of said judgment, which was erroneously entered by said Court of Appeals, and for its erroneous refusal to reverse the said judgment and its refusal to grant a rehearing (which was duly prayed for by petitioner) and said erroneous construction of said Act of Congress having been indicated as the view of the court below in its charge to the jury directing the ascertainment of the compensation for such interference.

Wherefore petitioner prays that said judgment of said United States Circuit Court of Appeals and said United States District Court may be reversed.

Thereupon the Railroad Company duly executed its supersedeas bond, which was approved by the court below (R., 253-254), the writ of error was issued and allowed (R., 256), and citation was issued thereon and executed upon the Telegraph Company. (R., 257.)

By stipulation between counsel the same exhibits, the originals of which by agreement of counsel were transmitted to the court below without being copied into the transcript, were omitted from the transcript on this writ of error, the contents thereof so far as necessary to the decision of any issue in this cause being sufficiently set forth in the testimony in the transcript, and it was further agreed thereby that the originals of said exhibits need not be transmitted to this court, and that the transcript on this writ of error should consist of the printed

transcript filed in said Circuit Court of Appeals. (R., 254-255.)

The statutes of the State of Louisiana, under which the Telegraph Company claimed the right to expropriate so much of the property and right of way of the Railroad Company as is covered by the judgment complained of herein will be printed in an Appendix to this brief.

The exceptions to the petition in the nature of a demurrer on the ground that no cause of action was alleged, the bills of exceptions during and at the conclusion of the trial, the charge of the District Court to the jury, the motion for a directed verdict in favor of the Railroad Company and the assignments of error, present, as we are advised, for the consideration and determination of this court, certain legal questions and propositions properly raised in the District Court and Circuit Court of Appeals, and decided by said courts adversely and erroneously to the prejudice of the Railroad Company's substantial rights. The principal and most material of these questions and propositions we shall now undertake to discuss, with a citation of the authorities relied on in support thereof, as follows:

ARGUMENT.

I.

JURISDICTION OF THIS COURT.

This suit is one of a civil nature between citizens of different States, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arises under the Constitution or laws of the United States, and was, therefore, removable from the State Court to the District Court of the United States for the proper district. (Secs. 24, 28, Judicial Code.)

That the sum or value in controversy exceeded the jurisdictional amount is shown by the verdict of the jury, on which the District Court entered the judgment complained of, for $6,000. (R., 64-5, 236.)

Any question that might have been raised against the removal to the Federal Court was waived by the Telegraph Company, as shown by the following order entered June 17, 1912 (R., 47):

> *On suggestion of counsel for plaintiff herein,* the refusal of the order to remove the above entitled cause to the U. S. District Court is hereby revoked, and it is now ordered that the said cause be removed to the U. S. District Court for the Eastern District of Louisiana.

This order, indeed, on its face, may be regarded as an agreement between the parties that the suit should be transferred to the Federal District Court there to pro-

ceed in all respects as if it had been originally commenced in that court.

No motion was made by the Telegraph Company to remand the case to the State Court.

The action is of a local nature, within the meaning of Sec. 57 of the Judicial Code, as it may be regarded, under the averments of the petition, as a suit to enforce a legal claim to real property within the Eastern District of Louisiana.

The jurisdiction of the District Court of the United States was not "dependent *entirely* upon the opposite parties to the suit or controversy, being * * * citizens of different States." The judgment of the Circuit Court of Appeals is, therefore, not final within the provisions of Sec. 128 of the Judicial Code, and this court has jurisdiction of this writ of error granted by the court below to review that judgment.

The Telegraph Company's petition, as amended, on its face, shows the parties to this suit are citizens of different States, and further shows the following facts, which raise Federal questions and involve the application and construction of the Constitution and laws of the United States:

1. The Railroad Company "is engaged in and is carrying on the business of a common carrier by railroad of passengers and freight through various States and in and through the State of Louisiana." (R., 3.) It is, therefore, entitled to all the protection of and subject to all the obligations imposed by the laws of Congress regulating and relating to railroad carriers of interstate com-

merce and their instrumentalities employed and used in such commerce, including road-beds, tracks, locomotives, cars, rights of way, telegraph, telephone and signal lines.

2. The petition further shows that where the Railroad Company's railroad in Louisiana "crosses *navigable* streams or bodies of water, bridges have been constructed, notably where said railroad crosses the streams known as the 'Little Rigolets' and 'Rigolets.'" (R., 3-4.)

It is also averred by the Telegraph Company it is necessary for the constructing, working, operating and maintaining of its telegraph line that "it should have the right to erect and maintain its telegraph poles, wires and appurtenances * * * upon * * * the bridges crossing the streams known as 'Little Rigolets' and 'Rigolets' belonging to the defendant company." (R., 5.) Further, "that on the bridges crossing the streams known as 'Little Rigolets' and 'Rigolets,' respectively, the poles are to be fastened and attached" to said bridges, as shown on a sketch marked Exhibit C filed as part of the petition. (R., 5.) The prayer of the petition asks the expropriation of the right to use for a telephone line the bridges across said navigable streams and waters. The condemnation, as the petition shows, is sought to be extended to the thread of the stream called Pearl River, another navigable stream, which constitutes the dividing line between the States of Louisiana and Mississippi, and across which stream the Railroad Company owns another railroad bridge.

The testimony, if it may be referred to in this connection shows said railroad in Louisiana is constructed upon still other bridges across navigable streams and waters, two of them being the Chef Menteur and Lake Catherine. (R., 101-2, 117, 134.) The Telegraph Company's witnesses testified one of these bridges was 3,000 feet long and another 400 feet in length. (R., 98.)

All bridges across navigable streams and waters must be, as this court will take judicial notice, constructed, maintained and operated under and by virtue of the Acts of Congress enacted in pursuance of the commerce clause of the Constitution of the United States. Necessarily, therefore, the question was raised as to the application and construction of said Acts of Congress for the decision of the District Court and the lower court in passing upon the right claimed by the Telegraph Company to expropriate the use of said bridges across the navigable streams and waters mentioned in the petition.

The court's attention is called to Chapter E, title "Bridges over Navigable Waters," Secs. 9961-9971, Mallory's U. S. Compiled Stats., 1913, showing the provisions of the Act of Congress, entitled "An Act to regulate the construction of bridges over navigable waters," approved March 23, 1906, as well as of certain prior Acts of Congress covering the same subject-matter.

We quote the first and second sections of said Act of March 23, 1906, as follows:

9961. (*Act of March 23, 1906, c. 1130, §1.*) *Bridges over navigable waters not to be built until*

plans, etc., approved; plans not to be deviated from unless modification approved.

When, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. (34 Stat. 84.)

9962. (*Act of March 23, 1906, c. 1130, §2.*) *Bridges built in accordance with Act to be lawful structures and post routes; privileges, as to use thereof, of United States, and of telegraph and telephone companies.*

Any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the

rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. (34 Stat. 85.)

The application as well as the effect of these provisions of said Bridge Act as bearing especially upon the rights or privileges of telegraph companies thereunder, with respect to their lines using bridges constructed over navigable streams and waters, are necessarily involved in view of the averments of the petition, seeking to expropriate such use.

We shall have occasion to refer to Sec. 9962, *supra*, in another part of this brief.

The right to condemn the use of such bridges in order to swing and attach telegraph wires or cables and other fixtures thereon can not be conferred by the State of Louisiana, the power of Congress over bridges across all navigable streams and waters being exclusive and supreme.

3. In its amended petition the Telegraph Company pleads and relies on its due and formal acceptance of the provisions of the Act of Congress entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, "with all

the powers, privileges, restrictions and obligations *conferred* and required thereby." (R., 10.)

The scope and effect of that Act was thus presented for decision by the District Court and the court below. The District Court so understood the Telegraph Company's cause of action, and proceeded to determine in its charge to the jury that the right to expropriate the property of the Railroad Company, including, of course, said bridges, asserted by the Telegraph Company was derived from the Federal Statutes as well as the State Statutes, as follows (R., 143):

> In this case your *sole* duty is to fix the damages that the Western Union Telegraph Company shall pay the Louisville & Nashville Railroad Company. *I charge you that the Telegraph Company is entitled, under the law of the State of Louisiana and the Federal Statutes, to this right of way.*

It is conceded that the Act of July 24, 1866, granted to any telegraph company then or thereafter organized under the laws of any State in the Union, and which accepted said Act as therein provided, the right to construct, maintain and operate lines of telegraph "over, under or across the navigable streams or waters of the United States: *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters." But the claim of the Telegraph Company in this case that said Act granted to it any right for telegraph purposes to the use of bridges owned, erected, maintained and operated by a Railroad Company, in accordance with laws

of Congress, across such navigable streams and waters is disputed; and one of the vital questions raised by the petition as amended, decided by the court below adversely to the Railroad Company, was the right claimed by the Telegraph Company under said Act of Congress to expropriate for its telegraph line the use of said bridge structures of the Railroad Company.

In support of our contention that this court has jurisdiction of this writ of error, we cite the case of *Florida, C. & P. R. Co.* v. *Bell*, 176 U. S. 321, in which it was decided that a judgment of the Circuit Court of Appeals could not be held final on the ground that the jurisdiction of the Circuit Court was dependent entirely upon diverse citizenship, where the plaintiff's declaration claimed, although without real foundation, that the controversy turned on the construction of the laws of the United States and both courts dealt with the case on that assumption.

Also to the case of *Henningsen* v. *U. S. Fidelity & G. Co.*, 208 U. S. 404, where it was held an appeal from a Circuit Court of Appeals to this court would not be dismissed on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, when it appeared that the grounds of the suit and relief were also based upon Federal Statutes, which were necessary elements of the decision of the Circuit Court of Appeals.

The jurisdiction of a Circuit Court of Appeals is not final because the jurisdiction of the District Court, as originally invoked, depended solely upon diverse citizen-

ship, where, by an amended and supplemental bill, there were added to the ground of original jurisdiction constitutional grounds, which existed before the suit was begun, and which might have been averred in the original bill. (*Tuckahoe v. Hanson*, 210 U. S. 267.)

There no valid process was issued or served on the Telegraph Company's petition until the filing of the amended and supplemental petition, setting up and relying on the Act of Congress of July 28, 1866 (R., 10), and the order of removal to the United States District Court was made thereafter on June 17, 1915. (R., 67.)

The record shows the matter in controversy exceeds $3,000, besides costs, as required by Sec. 240, Judicial Code.

It is insisted, therefore, that in view of the allegations of the petition as amended alone, without reference to the Federal questions raised by the answer and the subsequent proceedings, as shown by the transcript of the record, that the jurisdiction of the District Court and the Circuit Court of Appeals was not "dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States," and, for that reason, the judgment of the latter court herein complained of is not final, and this court has jurisdiction to review the same on this writ of error.

II.

CONGRESS BY ITS LEGISLATION HAS OCCUPIED THE FIELD OF REGULATION WITH RESPECT TO THE USE OF RIGHTS OF WAY OF POST-ROADS OR INTERSTATE RAILROAD COMPANIES BY TELEGRAPH COMPANIES, TO THE EXCLUSION OF STATE LEGISLATION ON THE SAME SUBJECT-MATTER.

Congress in the exercise of its powers to regulate commerce among the several States, to establish post-roads, and to raise and support armies, in the Act approved June 15, 1866, commonly known as the "Railroad Act" (Sec. 5258, U. S. Com. Stats., 1901), declared:

> That every railroad company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon its road * * * all passengers, troops, Government supplies, mails, freight and property on their way from any State to another, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.

In *Bowman* v. *Railroad Co.*, 125 U. S. 465, this court said:

> It may be material also to state in this connection that Congress has legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5258 of the Revised Statutes

provides (quoting the above act). In the case of *Railroad Company* v. *Richmond,* 86 U. S., 19 Wall. 584, this section, then constituting a part of the Act of Congress of June 15, 1866, was considered. Referring to this Act and the Act of July 25, 1866, authorizing the construction of bridges over the Mississippi River, the court says: 'These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by State enactments or by existing laws of Congress. • • • The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation.

The Act of Congress commonly known as the "Telegraph Act," approved July 24, 1866, contains the following provisions (Secs. 5262-5268, U. S. Com. Stats. 1901):

That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Con-

gress, and over, under or across the navigable streams or waters of the United States. *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads (railroads).

That telegraph communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association or person: *Provided, however,* that the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster General, of the restrictions and obligations required by this Act.

By the Act approved June 8, 1872 (Sec. 3964, *Ib.*), Congress provided further:

> The following are established post-roads:
> All the waters of the United States, during the time the mail is carried thereon.
> All railroads or parts of railroads which are now or hereafter may be in operation.

The Act of Congress, approved June 23, 1879, declared (Sec. 5268, *Ib.*):

> Telegrams are authorized to be transmitted by *railroad* companies which may have telegraph lines, and which shall file their written acceptance of the restrictions and obligations imposed on telegraph companies by the title Sixty-five of the Revised Statutes (the Act of July 24, 1866), for the Government *and for the general public,* at rates to be fixed by the Government, according to the provisions of title Sixty-five of the Revised Statutes.

This court has often held:

> The transmission of intelligence by means of telegraph wires is interstate commerce and telegraph companies which have accepted the provisions of the Act of 1866 are subject to the regulating powers of Congress and free from the State regulations, except such as are strictly of a police character. The authority of Congress over the subject of commerce by telegraph with foreign countries or among the States is supreme whenever that body chooses to exert its power and the States can impose no impediments to the freedom of that commerce.

Pensacola Telegraph Co. v. *Western Union Telegraph Co.*, 96 U. S. 1.
Telegraph Co. v. *Texas*, 105 U. S. 160.
Western Union Telegraph Co. v. *Pendleton*, 122 U. S. 347.
Postal Telegraph Co. v. *Charleston*, 133 U. S. 63.
Western Union v. *James*, 162 U. S. 650.
Ratterman v. *Western Union Telegraph Co.*, 167 U. S. 411.

This court has also declared:

> By the acceptance of the provisions of the Act of 1866 telegraph companies become instruments of commerce and agencies of the National Government.

Telegraph Co. v. *Texas*, 105 U. S. 460.
Western Union Telegraph Co. v. *Massachusetts*, 125 U. S. 530.

This court in *Ex parte Rapier*, 143 U. S., said:

> When the power to establish postoffices and post-roads was surrendered to the Congress it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective.

In *Ex parte Conway*, 43 Fed. 77, the court said:

> Under the Act of Congress, March 1, 1884, declaring all public highways and roads to be post-roads of the United States, a person engaged in erecting a telegraph line along a public road for a company which has accepted the provisions of the Act of Congress, 1866, is acting under authority of an Act of Congress, and, if arrested by the State authorities for obstructing the highway merely because of the prosecution of such work, will be released on habeas corpus.

The foregoing Acts of Congress should be construed in the light of contemporaneous history. It will be noted that "The Railroad Act" and "the Telegraph Act," above set out, were passed at the first session of Congress succeeding the Civil War. It is a matter of common knowledge that up to the time of the Civil War, the various railroads of the country were mainly constructed by State or local aid and in a majority of cases the termini were on State lines. In other words, each railroad was confined within the territorial limits of the respective States lending their aid and its sovereign power of eminent domain, and the railroads were not constructed between the States so as to form continuous highways from State to State. It is also a matter of common knowledge that during the turmoil incident to the Civil War, commerce between the States was thoroughly demoralized and at a stand-still, growing out of the seizure by the Federal and Confederate troops of the different railroads and telegraph lines in the territory occupied by the respective armies. Trains were taken possession of, merchandise in course of transportation was seized and confiscated, engines and cars were seized, bridges burned, railroad tracks and telegraph wires destroyed and communication interrupted and secrets exposed. In fact, at the close of the Civil War the transportation of commerce by railroad and the transmission of intelligence by telegraph were greatly obstructed and in many instances practically destroyed, and in order to give the railroad and telegraph companies the protection of the commerce clause of the Con-

stitution, Congress passed the two Acts set out above in full.

Congress first asserted its rights over railroads, under the commerce clause of the Constitution, by passing the Act of June 15, 1866, and making them continuous highways of interstate commerce. On July 24th at the same session, Congress asserted its jurisdiction over telegraph lines, under the commerce clause of the Constitution, by conferring certain rights upon telegraph companies, and placing certain restrictions and obligations upon them when engaged in interstate commerce; also requiring telegraph companies to give the Federal Government an option to purchase their lines at a price to be fixed by arbitrators.

The Act of July 24, 1866, was elaborately discussed and its meaning fully defined by this court in the case of *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540. There this court said (p. 569):

> But in the Act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given, does not, as we have seen, apply to the extent contended for by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication; and this was the reasoning in the Pensacola case, and applied directly to the Act of 1866. We may repeat the language of the court: 'If private property is required it must, so far as the present

legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.'

In *Sweet* v. *Rechel, Cherokee Nation* v. *Southern Kansas R. Co.,* and *Kohl* v. *United States,* all cited *supra,* the property to which the constitutional protection was applied was property in private use.

Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the uses. A railroad right of way is a very substantial thing. It is more than a mere passage. It is more than an easement. We discussed its character in *New Mexico* v. *United States Trust Co.,* 172 U. S. 171. We there said that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetual and exclusive use and possession; also the remedies of the fee, and, like it, corporal, not incorporal, property.'

Further on this court said (pp. 573-4):

It follows from these views that the Act of 1866 does not grant the right to telegraph companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain.

Again, the court in that case said (p. 574):

By the Act of 1866 power of condemnation is not given, and, of course, methods of procedure are not involved in its construction. It is equally unnecessary to consider the questions which might arise if the State of New Jersey gave the right of eminent domain to the Telegraph Company. It is conceded by

> counsel that such right does not exist, and it happens that under the policy of New Jersey the right of way of the Railroad Company enjoys in that State immunity from compulsory proceedings instituted by the Telegraph Company.

So it will be observed this court in the decision last cited distinctly held that the Act of July 24, 1866, did not grant to telegraph companies the power to condemn the right of way of a railroad company for their uses and purposes and that the same could not be obtained except with the consent of the owner.

We have found no decision of this court holding that the States, since the Act of July 24, 1866, have power to grant to a telegraph company the right to condemn or expropriate for a telegraph line the right of way of a railroad company.

By Section 1 of the Act to Regulate Commerce, approved February 4, 1887, as amended by subsequent Acts, it is provided:

> That the provisions of this Act shall apply to * * * telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one State, territory or district of the United States to any other State, territory, or district of the United States or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, manage-

> ment, or arrangement for a continuous carriage or shipment), from one State or territory of the United States or the District of Columbia to any other State or territory of the United States or the District of Columbia. * * * The term 'railroad' as used in this Act shall include all bridges and ferries used and operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used and necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property.

We contend that Congress by the legislation hereinabove referred to has pre-empted and occupied the field of regulation with respect to railroad and telegraph companies engaged in interstate commerce; that they are both common carriers of such commerce; and all the instrumentalities in carrying on the same are subject alone to the exclusive control, jurisdiction and regulation of Congress; in other words, Congress having deliberately, in the Act of July 24, 1866, withheld from telegraph companies the power of eminent domain in acquiring rights of way for their telegraph lines on, over and along the rights of way of railroad companies engaged in interstate commerce, when dealing with that identical subject, and when it might have granted the same, the courts must presume it was the intention and purpose of Congress

that the rights of way of such railroad companies should be occupied by telegraph companies *only* with the consent of the owners thereof.

The permissive Act of July 24, 1866, in effect provided for two essential things to be done by a telegraph company before it could construct, operate and maintain its telegraph line on the right of way of an interstate railroad company, viz., first, to obtain the railroad company's consent, and second, to accept in writing the restrictions and obligations of said Act and file the same with the Postmaster General.

In speaking of the second Employers' Liability Act in *Mondou* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, this court said:

> True, prior to the present Act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. * * * The inaction of Congress, however, in nowise affected its power over the subject. * * * And now that Congress has acted, the laws of the States, in so far as they cover the same field are superseded, for necessarily that which is not supreme must yield to that which is.

In *Southern Railway Co.* v. *Reid & Beam*, 222 U. S. 444, it was held unnecessary for an Act of Congress ex-

pressly to prohibit legislation by the States on the same subject, but that the mere passage of an Act of Congress dealing with and regulating matters within its jurisdiction over interstate commerce was sufficient to exclude the States' police powers in the premises.

In *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, 223, and *Atlantic Coast Line R. Co.* v. *Wharton*, 207 U. S. 328, 334, it was declared that any exercise of State authority in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution.

No State shall exercise its police power, which either directly or indirectly affects interstate commerce, where the subject-matter involved is such as to require or even be susceptible of uniform regulation by the national government. (*Cooley* v. *Board of Wardens*, 12 Howard, 299.)

The Supreme Court, in *Henderson* v. *Mayor of the City of New York*, 92 U. S. 259, reaffirms the decision in that case and quotes therefrom:

> Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

This principle is again affirmed in *Bowman* v. *C. & N. W. R'y Co.*, 125 U. S. 465.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, this court said:

> The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile State or local action, as such action has been manifested by regulations operating, in some instances directly, in others indirectly, upon the means or instruments employed in that commerce.

In *Northern Pacific R'y Co. v. State of Washington*, 222 U. S. 370, there was involved the validity of an Act of the State of Washington regulating the hours of service of employes on an interstate train. The violation of the State statute was claimed to have been committed after the passage of the Act of Congress on the same subject, but before it became effective.

In the syllabus of that decision the propositions decided, pertinent to the instant case, are stated as follows:

> The right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power.
>
> Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once removes that subject from the sphere of State action, and even if Congress provides that the statute shall not go into effect until a subsequent date, the States lose control of that subject during the intermediate period from the enactment to the active operation of the statute.

Now, using the language of Chief Justice White in the opinion last cited (p. 270):

> The right of a State to exert its police power for the purpose of regulating interstate commerce in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power.

In a number of cases recently decided by this court it was held that the legislation by Congress enacted June 29, 1906, as the liability of carriers for loss and damage to interstate shipments, contained in what is known as the Carmack Amendment to Section 20 of the Act to Regulate Commerce, supersedes all regulations and policies of any particular State upon that subject, that only the silence of Congress heretofore authorized the exercise of the police power of the State upon that subject, and since Congress exercises its authority the regulating power of the State is at an end; and that in enacting said amendment it is evident that Congress intended to adopt a uniform rule as to the liability imposed upon interstate carriers by their bills of lading and relieve them from the diverse regulations to which they had heretofore been subject. (*Adams Express Co. v. Croninger*, 226 U. S. 491; *Chicago, Burlington & Quincy R'y Co. v. Miller*, 21. 513; *Chicago, St. P., M. & O. R'y Co. v. Latta*, 21. 519.)

Again, in another case (*Chicago, Rock Island & Pacific R'y Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426), decided by this court at the same time as the last

three cases cited (January 6, 1913), the validity of a statute known as the Minnesota Reciprocal Demurrage Law, effective July 1, 1907, was involved. After quoting certain provisions of the Act to Regulate Commerce to show that Congress had by its legislation covered the same subject as this State statute, so far as the furnishing of cars for interstate traffic was concerned, Chief Justice White concluded his opinion as follows:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of commerce on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent, but only permissive, power. *Southern R'y Co.* v. *Reid*, 222 U. S. 424.

The statutes of the State of Louisiana are invalid in so far as they may be construed to grant a telegraph company the right of eminent domain where it is sought to condemn for its uses and purposes the right of way of an interstate railroad company longitudinally, on which is constructed a railroad, constituting a military or post-road, because of the necessary interference with and the burden thereby placed upon such commerce. When such right is attempted to be conferred by such State laws it is ineffective for that purpose, because not within the domain of the police power of the State, even in the absence of legislation by Congress on the same subject-matter, as the power of Congress over interstate commerce and interstate railroads, which are expressly declared to be military or post-roads, is exclusive. *Bowman* v. *Chicago R. R. Co.*, 125 U. S. 524.

The State can pass no statute that will directly burden or impede the transportation of commerce between the States over an interstate railroad or that will impair the usefulness of its facilities or instrumentalities employed in such commerce.

Illinois Central R. R. Co. v. *Illinois*, 163 U. S. 152.

Every obstacle to or burden upon interstate railroad transportation amounts to a regulation of interstate commerce.

Railroad Co. v. *Van Huson*, 95 U. S. 465.
Wabash R. Co. v. *Illinois*, 118 U. S. 557.

We conclude our discussion under this head by calling the court's attention to its decision above cited, hold-

ing that the Act of July 24, 1866 (Secs. 5262-5268, Revised Statutes), is merely *permissive,* and that it confers no authority upon those telegraph companies which accept its provisions, to occupy the right of way of a railroad company, *except with the consent of such railroad company;* but that said Act does prevent a State from denying to telegraph companies accepting the same the right to occupy such railroad right of way, where the consent of the owning railroad company has been obtained.

It would, therefore, seem to follow that a State can not enforce such acceptance by a telegraph company, without the consent of the railroad company owning the right of way.

A State either has or has not jurisdiction over such occupancy. If it has such jurisdiction, it would seem to logically follow it has authority to prevent occupation by a telegraph company, even where the railroad company has consented thereto. But this court has expressly decided to the contrary.

In the case of *Western Union Telegraph Co.* v. *Pennsylvania R. Co., supra,* it did not decide the contention here made, but expressly passed it by stating (p. 574):

> It is equally unnecessary to consider the *questions which might arise* if the State of New Jersey gave the right of eminent domain to the telegraph company.

"The questions which might arise," where a State has attempted to confer upon a telegraph company, which has accepted the provisions of the Act of 1866, the right to

expropriate or condemn for its uses and purposes the right of way of an interstate railroad company, as the Telegraph Company claims the State of Louisiana has done, are still open for the decision of this court.

We respectfully submit that these questions do arise in the case here presented and should be considered and decided in favor of the Railroad Company upon the grounds and the authorities hereinabove cited.

III.

THE RAILROAD COMPANY'S CHARTER POWER AND AUTHORITY TO CONSTRUCT, OPERATE, AND MAINTAIN TELEGRAPH AND TELEPHONE LINES AS A COMMON CARRIER.

ITS RIGHTS OF WAY THEREFOR ARE NOT SUBJECT TO CONDEMNATION.

As already stated concerning the defenses set up in the answer, the legislative charter of the Railroad Company was amended in accordance with the laws of the State of Kentucky on November 23, 1911 (R., 210), so as to authorize and empower the Railroad Company to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad rights of way not only for the conduct of its own railroad business, but for commercial purposes as a common carrier of messages, news, intelligence and information *for the public at large,* and the receipt and delivery thereof, for just and reasonable compensation or hire in the State of Kentucky and the other States hereinabove mentioned, as provided by the laws thereof.

By Section 199 of the Constitution of Kentucky all telegraph companies are declared to be common carriers. Telephone companies serving the public for compensation are likewise common carriers. We do not understand that counsel for the Telegraph Company dispute the proposition that the Railroad Company, by the adoption of its said amended articles of incorporation, acquired under the laws of Kentucky the power and authority to own, contract, operate and maintain on its rights of way a telegraph or telephone system, one or both, for commercial purposes. Section 210 of the Constitution of that State declares:

> No corporation engaged in the business of common carrier shall directly or indirectly own, manage, operate or engage in any other business than that of a common carrier.

This is the only prohibition upon a common carrier, with respect to the business in which it may lawfully engage in that State. It is true Section 191 of the Kentucky Constitution declares:

> No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized.

That provision, however, does not stand in the way of the Railroad Company engaging in the telegraph or telephone business as a common carrier for commercial purposes, for, since the adoption of its said amended articles

of incorporation, that class of business is "expressly authorized by its charter."

There is no statute in Louisiana which prohibits the Railroad Company from owning, constructing, operating and maintaining telegraph and telephone lines, as a common carrier or for commercial purposes in that State.

Furthermore, as heretofore stated, the Act of Congress, approved June 23, 1879 (Sec. 5268, U. S. Com. Stats., 1901), declares:.

> Telegrams are authorized to be transmitted by *railroad* companies which may have telegraph lines, and which shall file their written acceptance of the restrictions and obligations imposed on telegraph companies by title sixty-five of the Revised Statutes (Act of July 24, 1866), for the Government and *for the general public* at rates to be fixed by the Government, according to the provisions of title sixty-five of the Revised Statutes.

This Act of Congress operates as a grant to all railroad companies that comply therewith of power and authority to conduct the business of a commercial telegraph company.

The written acceptance referred to in that Act and required by the Act of July 24, 1866, was, as we have seen, duly executed by the Railroad Company on January 12, 1912, and filed with the Postmaster General, January 15, 1912. (R., 219, 220.)

So, it is clear, from what has been stated, the Railroad Company is authorized by the State of Kentucky and by the Congress of the United States to operate and main-

tain a railroad over its rights of way described in the record herein, and to operate telephone and telegraph lines and signal wires upon and over said rights of way in all the States where its railroads are situated and operated.

That the entire available width of said right of way in Louisiana is necessary for the proper and safe operation of said railroad and of said telegraph, telephone and signal wires, to avoid obstruction and interference with the Railroad Company's operations, is made manifest by the testimony of the witnesses on the trial. (W. H. Courtenany, R., 106-108, 117, 118, 121-124; A. R. Fugina, *Ib.*, 125-127; Chas. Marshall, *Ib.*, 130, 133, 135.)

So, we maintain it is true, under these facts and circumstances, that neither the State of Kentucky nor any other State has power to condemn or authorize the condemnation of any part of said rights of way, for the entire width thereof is needed, or will be in the near future, for the construction, operation and maintenance of the Railroad Company's railroad tracks, telephone, telegraph and signal lines, in order to conduct its legitimate business as a common carrier by railroad and by telephone and telegraph, safely, efficiently and successfully, as required by law.

As well said by the court in *Western Union Telegraph Co.* v. *Polhemus,* 178 Fed. 904, 906, quoting from Chief Justice Shaw in *Brainard* v. *Clapp,* 64 Mass. 6:

> 'Railroads are extremely costly, and proprietors can not in the outset make and complete all the works which they contemplate and intend to make; because

these works are comparatively new, and improvements are constantly making in the structure and management of the works, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them.'

The court then proceeds to say:

And this future exercise of easement rights seems to have been generally followed, and was recognized in this circuit in Lake Shore & M. S. R'y Co. v. New York, C. & St. L. R'y Co., 8 Fed. 858, by Judge McKennan, who, where one railroad sought to condemn in part the easement of another, said:

'At the points of the alleged conflict, no actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business.'

And in Western Union Telegraph Co. v. Pennsylvania R. R. Co., 120 Fed. 366, affirmed 195 U. S. 594, wherein it is said:

'We deem the question therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose, such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.'

IV.

THE RAILROAD COMPANY HAS THE PREFERENTIAL RIGHT OF LOCATION FOR ITS OWN TELEGRAPH, TELEPHONE AND SIGNAL LINES ON ITS RIGHTS OF WAY.

The uncontradicted evidence in the record establishes the fact that the Railroad Company prior to the trial in the District Court had made and selected on its rights of way in Louisiana and other States the location for its own telephone or telegraph lines, which was practically the same location in all substantial respects as the location on said rights of way then occupied by the Telegraph Company with its telegraph line.

W. H. Courtenay, Chief Engineer of the Railroad Company, states under orders of the Executive Department that by Roadmaster Brown and R. R. Hobbs, Chief Operator of Telegraph, a location had been selected for a line of poles and wires for the Railroad Company on the greater part of its lines, including that in Louisiana, and that the direction given by him governing such location was to select the best and most available and economical location for a line of poles and wires for the Railroad Company's use. (R., 116, 118-120.)

W. G. Brown, Roadmaster of the New Orleans Division of the Railroad Company, states that, with the assistance of R. R. Hobbs, Superintendent of Telegraph of the Railroad Company, he surveyed and located lines for the proposed telegraph and telephone wires and poles to be built and used by the Railroad Company for the oper-

ation of its trains by telegraphic and telephonic orders and instruction along the right of way of that division, and at the dates stated by him, beginning in April, 1912. (R., 120, 121.)

No valid process was issued on the Telegraph Company's petition in this suit until May 21, 1912, nor was it served by the sheriff until May 31, 1912. (R., 8-13.)

In doing this work he went over the several lines, making a personal examination of the rights of way and marking the locations which he selected on the right of way maps of the Railroad Company, which are a part of the records in the Chief Engineer's office. (R., 121.) He sets forth the reasons the location made by him is the best location for the Railroad Company's line of poles and wires and why the location then occupied by the Telegraph Company was selected for that purpose.

The Railroad Company's location for its own line of poles and wires on its rights of way was not only prior in *right*, but prior in *time*.

But it was not even essential that the Railroad Company should have made and selected the location for its line of poles and wires on its own right of way, where the existing telegraph line thereon is located, *before* the Telegraph Company instituted its suit, and served the Railroad Company with process thereon, to condemn the right to continue the operation and maintenance of such existing telegraph line thereon. The Railroad Company had for many years both lines of telegraph and telephone of its own, which it had and was then still using upon that exact location, and, in any event, had the preferential

right to such location. Such preferential right has been distinctly upheld by the Supreme Court of Georgia in injunction suits brought by the Railroad Company, and other railroad companies in the Superior Court of Fulton County, in that State, to enjoin the Telegraph Company from condemning or attempting to condemn for its uses and purposes that portion of the rights of way of said railroad companies occupied by it and which had been selected by the said railroad companies, respectively, as the location for their own telegraph and telephone lines. Said Superior Court had denied the injunctions sought by the railroad companies to prevent such condemnation, but the latter appealed to said Supreme Court, which reversed the judgments appealed from in the respect mentioned.

The main opinion referred to of the Supreme Court of Georgia was delivered in 1912 in the case of the *Western & Atlantic Railroad Company* v. *Western Union Telegraph Company* (138 Ga. 420, 427), 75 S. E. 471, and was followed in the like cases of the Railroad Company, and of the lessees of the Georgia Railroad against the Telegraph Company. (*Ib.*, p. 477.) On the point here under consideration that court said (*Ib.*, pp. 474-5):

> It appeared from the evidence that the Railroad Company could not safely and expeditiously operate its cars and engines without the aid of a telegraph line; that the demands of a modern railway are such that a telegraph system is a necessary auxiliary to its safe and proper operation. In view of the Telegraph Company's voluntary termination of its con-

tract with the Railroad Company, the latter is compelled to erect and maintain its own telegraph posts and wires, in order to operate its road by means of electrical signals and orders. The Railroad Company contends that it should have the right of prior selection in the location of a line of telegraph for railroad use, and that it intends to erect poles upon substantially the same location as at present occupied by those of the Telegraph Company. On the other hand, the Telegraph Company denies that the Railroad Company has any such right, but asserts that it has the right to select a route over the Railroad Company's right of way at any point which does not materially interfere with the Railroad Company in the conduct of its business. These conflicting claims must be solved by the application of the rule that property dedicated to one public use can not be subjected to another public use, except in cases where the latter use does not materially interfere with the former. If the Railroad Company owned the existing line of telegraph, and it was necessary to maintain and have it for the safe and convenient handling of its trains and cars, no one would seriously contend that the Telegraph Company could deprive the Railroad Company of its use by virtue of the exercise of the right of eminent domain. Assuming, of course, the necessity of a line of telegraph as auxiliary to the operation of a railroad company, the Railroad Company would have the same right in locating its telegraph lines as it would have in locating its railroad track, or its depot, and its warehouses on its own right of way. If a railroad company was originally constructing its track, could it be said that a telegraph company could arbitrarily

subject either for the police or us to force the railroad company to build its track on a less desirable place on its own right of way? Surely not. The fundamental basis of the principle of subjecting one public use to a second public use is that the first use must not be materially interfered with. It would indeed be a most unfair demand to make of the owner of property charged with the discharge of a public duty, that he must take his property subservient to the convenience of the demandant who desires it for another public use. The Railroad Company is held off by its contract from constructing its line of telegraph on that portion of its right of way which it prefers, and which it has selected, until the contract expires; and the Telegraph Company should not be given a preference, because it is not fettered by the same contract, in proceeding to condemn the same portions of the railroad right of way. This conclusion can not be affected by the fact that the telegraph line was in existence at the execution of the lease. There was no exception, either in the leasing act or the contract of lease, that the lessee was to take the road burdened with a use by the Telegraph Company. The Telegraph Company recognizes that its right to occupy the right of way is contractual; hence its notice to the Railroad Company to terminate the contract, and its proceedings to acquire the right of occupancy by condemnation.

In *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 220 Fed. 362, the court at page 369 said:

> Moving entirely into the contract of tenancy, and its possession of the *lease in gross* being under an expressed covenant and an implied obligation to pay

matter of the construction of the statute. It is clear on above laws in this opinion, that the statute was avail itself of the pre-existing adverse rights in favor the owner's dominant title. The one not right enjoyed by the owner under the laws not prevent thereby be made a ground for denying the landlord the implied and recognized right to have possession granted, and the dominant estate restored.

The decision denying to the Telegraph Company the right to continue in that use was affirmed by the Court of Appeals for the Third Circuit in 111 Fed. 16, whose decision was affirmed by this court in 183 U. S. 69.

We submit the court below erred in not following the principle laid down by the Georgia Supreme Court upholding the Railroad Company's preferential right to erect and select the location, which it chooses as necessary, from an economical or operating standpoint, for its own telephone or telegraph line as to the right of way. A contrary view is sustained neither by reason nor authority. The effect of such refusal of the lower court to follow the ruling announced by the Georgia Supreme Court in this respect was to keep the Telegraph Company in undisturbed possession of that part of the Railroad Company's right of way used and occupied by it to the exclusion of the Railroad Company.

The invalidity of this ruling of the court below must be apparent to this court, since it has thus become the effective means, so far, of not only continuing the Telegraph Company in possession of the Railroad Company's

location for its own telephone and telegraph line of poles and wires, but of preventing the Railroad Company from constructing, operating and maintaining such line, which is absolutely necessary for the safe, efficient and successful conduct of its railroad business, independently of the Telegraph Company. In other words, the judgment of the District Court, affirmed by the Circuit Court of Appeals, if not reversed on this writ of error, operates to permanently deprive the Railroad Company of its preferential right of location on its own right of way in Louisiana, and meantime, the Railroad Company is compelled to depend upon the wires attached to the existing telegraph poles on its rights of way for telephone or telegraph service needed in the conduct of its railroad business.

V.

THE TELEGRAPH COMPANY IS WITHOUT CHARTER POWER TO ACQUIRE OR OPERATE TELEGRAPH LINES ON THE RAILROAD COMPANY'S RIGHT OF WAY IN LOUISIANA.

This proposition goes to the *power* of the Telegraph Company to acquire by condemnation or otherwise any portion of the right of way which it seeks to condemn in its petition herein or to construct, operate or maintain a telegraph line upon such right of way in the State of Louisiana.

If the Telegraph Company has no power to acquire by condemnation or otherwise and no right under its charter to construct, operate and maintain a telegraph

line in Louisiana, it is clear the judgment of condemnation is erroneous. The Telegraph Company has no standing in court to maintain this suit, if it has no charter power, to construct, operate or maintain telegraph lines between the points stated in its petition. Certainly it could not borrow the sovereign power of eminent domain from any State for the purpose of enabling it to acquire property to do something that it is not authorized by its charter to do.

This question is raised fully in the answer. All the various Acts of the New York Legislature and the certificates of incorporation of the Telegraph Company thereunder were introduced in evidence at the trial.

The Telegraph Company shows that it had been in possession of the right of way of the Railroad Company in Louisiana under a contract for a period of more than twenty-five years, and failing to secure the consent of the Railroad Company for a more favorable contract to its interests, it seeks to condemn a right of way for the purpose of *continuing the operation and maintenance of its lines upon the railroad right of way as originally constructed and where the same are now located.*

It will be observed from "Exhibit Plaintiff 1" (R., 146-150) that the original Act of April 12, 1848, of the State of New York for the incorporation and regulation of telegraph companies, and under which the New York & Mississippi Valley Printing Telegraph Company, the predecessor of the Western Union Telegraph Company, was incorporated and organized, required the persons incorporating thereunder to execute a certificate specify-

ing, among other things, "the general route of the line of telegraph, designating the points to be connected." (R., 146.) In the articles of incorporation of that original company, executed April 1, 1851, it was specified (R., 157, 158):

> Art. 2. The route of the said telegraph line shall pass through this State, from the city of Buffalo to the State of Pennsylvania, along the south side of Lake Erie.
>
> Art. 3. This company shall own and operate the residue of the said telegraph line from the boundary of the State of New York through the several States, to the city of St. Louis, touching at Cleveland, Columbus and Cincinnati, and thence to St. Louis by such route as shall be designated by the directors, to be constructed by the said Sanford J. Smith and Isaac Butts, under and by virtue of authority from the said States respectively, or from the persons whose lands the said line may cross.

On February 21, 1854 (R., 171-176), said original company reincorporated under the Act of April 12, 1848, as amended by the Act of June 29, 1853, which provided (R., 151):

> Any number of persons may associate for the purpose of owning or constructing, using and maintaining a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions and subject to the liabilities prescribed in the Act passed

April 12, 1848, entitled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' and such association shall, upon complying with the provisions of the said Act, become a body corporate, and shall have the powers, and be subject to the provisions in the said Act, and in the several Acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the Secretary of State a certificate of a resolution adopted by a majority of its board of directors to organize under this Act, which said certificate shall contain the specifications required by the said recited Act, and shall be proved or acknowledged and recorded in the manner therein prescribed.

In the certificate of incorporation under said original Act as thus amended the following specification as to the route was made (R., 172):

Second: That the general route of the said line of telegraph is from a point in the city of Buffalo, in the State of New York, to the city of Louisville, in the State of Kentucky, passing through Dunkirk, in the State of New York, through Erie, in the State of Pennsylvania, through Cleveland, Columbus, Dayton and Cincinnati, in the State of Ohio, and through Covington, Georgetown and Frankfort, in the State of Kentucky, to the city of Louisville aforesaid (including a branch circuit to Lexington, in the last mentioned State), which several places above men-

tioned are indicated as the points to be connected thereby.

The name of said company was changed to the Western Union Telegraph Company by an Act approved April 4, 1856. (R., 153, 154.)

On April 22, 1862, the Legislature of New York further amended the original Telegraph Act of that State as follows (R., 154, 155):

> Sec. 1. Any telegraph company which is duly incorporated under and in pursuance of the Act entitled 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' passed April 12, 1848, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said Act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this Act.
>
> Sec. 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in

leasing, constructing, owning, using or maintaining any such line or lines, or shall become lessee of any such line or lines, such company, *within one year after* constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or after acquiring any other interest in such line or lines, shall file in the office of the Secretary of State of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section 2 of the Act hereby amended, which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in subdivision 5 of the section above mentioned.

Sec. 3. Any telegraph company incorporated as mentioned in the first section of this Act, which before the passing of this Act shall have purchased, constructed or leased, or shall have joined with any other corporation or association in the purchase, construction or leasing, or shall have become the owner or holder of any interest in any line or lines of telegraph not described in their original certificate of organization may, *within one year after the passage of this Act,* make and file in the office of the Secretary of State such certificate as is provided in the second section of this Act, and upon the filing of such certificate, their act, if otherwise within the provisions of this statute, shall be as valid and effectual as if done after the passing of this Act, saving all existing rights of other persons.

The Telegraph Company failed to prove (although the burden was on it to establish by evidence its charter powers put in issue by the answer and to show compliance with the laws of New York) it had filed with the Secretary of State of that State a certificate showing it had adopted the termini or the route traversed by its line or lines, or purporting to amend prior certificates in order to change its termini, route or routes.

The right of the Telegraph Company to condemn land or property for the purpose of constructing a line beyond the limits prescribed in its charter is denied; and it is denied, notwithstanding the fact that the right sought to be exercised is claimed by virtue of certain statutes of the State of Louisiana, which in general terms authorize telegraph companies organized under the laws of that State or any other State to exercise the right of eminent domain for the purpose of procuring a right of way.

In order to present definitely the position here taken, it is necessary briefly to state some of the admitted facts in this record.

1. The charter of the Telegraph Company specifically fixes the limits within which it is authorized to operate a telegraph system, and none of the territory involved in this litigation is within the limits of that charter provision.

2. It is further undisputed, as shown in this brief, that the only method by which the Telegraph Company could procure any authority to operate under its own charter, beyond the limits set by the charter itself, is by

a process of amendment provided by the Act of the Legislature of New York of April 22, 1862. (R., 154-155.)

Under Section 2 of that Act, it is provided that in case the Telegraph Company extends its lines in this way, it shall, *within one year after constructing such a line, or becoming the owner of such a line,* file in the office of the Secretary of State of New York a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section 2 of the Act of 1848. (R., 146-147.)

3. Under Section 2 of the Act of 1848 it was essential, in order to be authorized to exercise the power of a telegraph company, that the company file a certificate, specifying the general route of the telegraph line, and designating the points to be connected.

4. It is admitted in this record, by the failure to show to the contrary by any competent proof thereof, by the Telegraph Company, that no such certificate has ever been filed in reference to any of the territory embraced in this litigation.

So, then, we have a corporation organized under the laws of New York, that in so far as this record discloses has no authority to own or operate a telegraph line in Louisiana.

Nevertheless, we have this same corporation seeking to exercise the right of eminent domain granted generally by the State of Louisiana to corporations organized for the purpose of conducting telegraph lines, whether chartered within or without that State.

The contention made here may be set out as follows:

First Proposition. The purpose for which a State grants the right of eminent domain must always be a public purpose, which will facilitate and aid the people as a whole in conducting their affairs. So that when a State grants the power of eminent domain to a corporation, it necessarily means that the grant is made to a corporation that is in position to discharge obligations to the public; otherwise, the consideration for the grant of the power of eminent domain must fail.

Therefore, the corporation which seeks to take advantage of these statutes conferring the power of eminent domain must show, as a condition precedent to the exercise of the power, that it has existing power under its charter to fulfill these public obligations, and that a discharge of its obligations to the public would not be *ultra vires,* or such as would subject it to a forfeiture of its charter by the State of its creation.

It is beyond the power of the State of Louisiana, for example. to confer any power upon a New York corporation that is directly antagonistic to the limitation put upon the power of the latter by the Legislature of New York itself. Whatever power the New York corporation can have is, as a general rule, measured by the laws of the State of its creation. Even in the absence of clear evidence that the State creating the corporation intended to limit its power, it would not be proper for the State of Louisiana to undertake to enlarge the corporate powers of a corporation organized under the laws of New York.

Louisiana may permit a corporation organized under the laws of New York to do all the things in Louisiana that it would be authorized to do under the laws of New York; and, in order to facilitate this matter, perhaps it may be, in certain cases, that Louisiana could give facilities for the carrying out of the business of the New York corporation in Louisiana that it would not have even in the State of its own creation. For example, it might be true that telegraph companies should be denied the power of eminent domain under the statutes of New York, and yet Louisiana might authorize it to exercise the power of eminent domain in Louisiana, for the purpose of carrying on the business for which it was created; but it can not clothe the corporation of New York with a power to enable it to carry on business in Louisiana which is expressly or impliedly inhibited by its charter.

The right that a corporation organized under the laws of New York has to carry on business in Louisiana arises out of the doctrine of comity existing between the States. That doctrine means that Louisiana, for example, will aid and co-operate with a corporation organized under the laws of New York to carry out all of its powers in Louisiana, as fully as though it were operating in New York. But it can not be construed into a policy which would justify Louisiana in authorizing a New York corporation to engage in enterprises that were not within the scope of its creation, and which would be supposed to be against the will of the sovereign creating it. This would not be comity between the States. It would be directly the reverse.

Therefore, it is insisted that a State that has passed general statutes authorizing corporations chartered under the laws of other States to exercise the right of eminent domain for the purpose of acquiring rights of way for telegraph companies, necessarily had in mind only such telegraph companies as were duly empowered by their own charters to exercise their corporate powers within the territory of the State that has enacted such general statutes.

And, further, that regardless of the intention of the legislature, it could not confer such power upon a corporation that was unable to live up to its obligations.

The question here presented is whether a telegraph company organized under the laws of the State of New York, which provides that the charter of a telegraph company shall describe the general route of the line of telegraph, designating the points to be connected thereby, can condemn property in the State of Louisiana, or between points not described in its charter; or, in other words, whether a telegraph company, organized under the laws of a foreign State that is limited in its charter powers with respect to territory outside of the State of its adoption can take advantage of the powers of eminent domain granted by a State not embraced in territory to which its charter powers do not extend. In order to present the matter from a practical standpoint let us take the instant case. The original charter of the Telegraph Company provided for the construction of a line from Buffalo, New York, to St. Louis, Missouri, describing the route. Now, can that company under this charter come

into the States traversed by the Railroad Company by comity, and by virtue of the enabling statutes of such States, exercise the power of eminent domain between points not on the route described in its charter, as is sought to be done in this condemnation proceeding?

It is a well-settled proposition that the power of eminent domain can be delegated by a State to a foreign corporation, but in order to make a valid delegation of the power it must be for a public purpose, that is, the corporation to whom the power is delegated must be one that can be compelled by law to serve the public in its operation. The State delegating the power presupposes that the foreign corporation taking advantage of its powers by comity or by virtue of its enabling statutes is not acting beyond the limits of its charter.

> A corporation can exercise its franchise extra-territorially only so far as may be permitted by the policy or comity of other sovereignties. By such consent it may transact there any business not *ultra vires*.
>
> *St. Louis* v. *Ferry Co.*, 11 Wall. 423.
> *Bank* v. *Earl*, 13 Pet., 519.
> *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28.

When a telegraph, railroad or other public service corporation, organized under the general laws of one State, enters another State for the purpose of exercising the power of eminent domain two things are essential:

First: It must have the corporate power in its charter, derived from and within the limits of a general act

of the State creating it, to carry on that particular business in the State of its adoption.

Second. It must have the power of eminent domain delegated to it by the adopted State wherein it seeks to exercise it, but then it can only be used within the limits of its charter powers.

The charter can be no broader than the general act from which it derives its powers.

> When a corporation is organized under a general corporation law authorizing the formation of such corporations, its charter consists of the law under which it was organized and of the articles or certificate of association or incorporation adopted or issued in pursuance of the law in so far as they are in compliance with and authorized by the law. The articles or certificate do not alone constitute the charter and determine the powers of the corporation, but they are to be taken in connection with the statute. The statute is controlling and the articles or certificate are valid and effectual, not only in so far as they are not in conflict with the statute, but in so far as the powers therein claimed are authorized by the statute.
>
> *Clark & Marshall on Private Corporations*, Vol. 1, p. 675.

The incorporators may, however, circumscribe the charter power by not taking all that the general act confers, in which event the corporation is limited by the charter rights it actually takes. If the general act prescribes certain territorial limitations for its field of operation and the incorporators confine themselves to a

A public service corporation, in seeking to condemn land, must show not only a statute of the State which authorizes the appropriation of property for the particular purpose for which it is sought, but it must also show that it has the power, under its own charter, to use the property where it is situated for the purpose for which it is seeking to acquire it.

It is insisted that the decisions are overwhelming on the proposition that if a corporation has no power to perform certain acts in a State other than the State of its creation that no other State, except the State of its creation can give it this power, and any effort to exercise rights under statutes of another State is an *ultra vires* act. For whatever powers a corporation may acquire from the acts of States in which it was not organized, and by which it was not created, it can never get away from the purpose of its own creation, as stated in its own charter, and the inhibitions of the laws of its own State.

Thompson on Corporations, 2 Ed. Vol. 5, Sec. 6627.
Story's Conflict of Laws, 8 Ed. Sec. 106.
Falls v. *U. S. Savings, Loan & Bldg. Co.,* 97 Ala. 422.

A condemnation proceeding or expropriation of property is a contract *in invitum* with the landowner, and must fall under the same definition, and the Telegraph Company, in exercising the powers granted by the stats of Louisiana, for example, becomes bound by virtue 'he exercise of these rights in, and contract with, the er State, to perform public service functions; and if

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it is not in a position to carry out this part of the obligation, then it can not take advantage of the offer of the State, for it would result in a false situation, in that the Telegraph Company could not be made to live up to the obligations thus assumed.

We call the court's attention to the case of *Mayor and Aldermen of Knoxville* v. *Africa*, 77 Fed. 501, in which it was held:

> Under a general incorporation law for street railways, which requires the charter to set out the termini and general route of the proposed road, and provides that no streets shall be occupied until the 'consent' of the city authorities is first obtained by an ordinance prescribing the 'terms' thereof (*Mill & V.* Code, Secs. 1920-1925), the power of the city to so consent is limited to the streets included between the termini and in the general route described in the charter; and a further grant, purporting to give a right of way over all the streets of the city, present or prospective, thereby delegating to the company the power to elect from time to time the streets which it will occupy, is invalid. 70 Fed. 729, reversed.

This proposition was recognized in the case of *Metropolitan Bank of New York* v. *Godfrey*, 23 Ill. 599, where the charter of the Metropolitan Bank of the city of New York was under consideration, and under its charter it was not capacitated to hold land except for certain specified purposes. It was endeavoring to hold land in Illinois beyond the provisions of its charter. The court held that it could not take title to such prop-

erty, upon the ground that it was a creature of the State that created it; that all of its powers must be derived from its charter, and that it was not capable of exercising any of its faculties beyond the limits of the laws of its own State.

In the case of *Waterworks Co.* v. *Farmers L. & T. Co.*, 20 Colo. 209, the court said:

> A corporation is a creature of the law. It is always subject to the law of its charter, or if it has no special charter, then to the incorporation laws of the State or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case, regard must primarily be had to the laws of the State or sovereignty from which it has derived its franchises.

In the case of *State* v. *Water Company*, 61 Kans. 565, the court, among other things, said:

> It has been the policy to permit foreign corporations chartered under the laws of other States, to transact business here. In 1898, an Act was passed by the Legislature, providing for the regulation of foreign corporations and prescribing a method by which they might be permitted to do business in this State. The defendant corporation has complied with all of the conditions of the Act mentioned. We do not hold, however, that such regulation gives it

> power beyond that conferred by the laws of the State of its creation.

See also *Land Grant R'y Co.* v. *Coffee County*, 6 Kans. 248.

In the case of *Starkweather* v. *American Bible Society*, 72 Ill. 50, the court held that the Society, being incapable of acquiring title to real estate by devise under the laws of the State of its creation, could not acquire title to real estate by devise in the State of Illinois, and such devise was void.

In the case of *Diamond Match Co.* v. *Michael Powers*, 51 Mich. 145, the court said:

> Comity to a foreign corporation can not extend to the point of granting its privileges which its charter does not permit it to exercise; and in applying for privileges, it must show that it has power to exercise them.

In the case of *Relfe* v. *Rundle*, 103 U. S. 222, Mr. Chief Justice Waite said:

> Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home; but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after its dissolution.

Numerous other cases could be cited in support of this proposition. An interesting case is that of *B. & O. Tel. Co.* v. *D. & A. Tel. & Tel. Co.*, 7 Del. 269.

It appeared that the B. & O. Telegraph Company of Baltimore had been chartered under the laws of the State of Maryland, to construct, own, operate, and lease lines of telegraph only in Baltimore and throughout the State of Maryland. The court held that where the corporation is, in its charter, expressly confined to the jurisdiction of its birth in its operation, it is not conceivable that it should be allowed to act beyond it.

> In the nature of its being it can not project itself by any mere recognition of court into another jurisdiction, and act there, for it would have nothing to show in justification. To adopt it in any way in another State, would be, in fact, a want of comity on the part of such State—as clothing it with a function which is withheld from it by the act which created it (p. 280).

It appears from the brief of counsel for the D. & A. Telegraph & Telephone Company, in that case it was insisted that there was no power in the B. & O. Telegraph Company to operate its line in Delaware, and that it could not be held that there was any such power implied, for the reason that, "such power is not necessary to carry into effect those expressly conferred," and because "not incidental to the very existence of the corporation." It was argued by said counsel that the Maryland statute undertakes to authorize an extension of telegraph lines into other States, only with the consent of the majority

of the owners of the capital stock of the corporation given in a general meeting. Hence, such consent by such meeting was a condition precedent to the right of the company to operate lines in Delaware, and should upon elementary principles of pleading, have been stated in the petition, especially in view of the fact that said case was an application to Delaware, through its courts, to compel the respondent to aid the relator in carrying out business in that State.

It was also claimed on behalf of the relator, that by virtue of Section 5263 of the United States Revised Statutes (Act of July 24, 1866), the relator had authority to operate lines of telegraph in Delaware. But that position was clearly untenable. The purpose of that statute is to prevent State interference with the freedom of action of different telegraph companies. *Pensacola Tel. Co.* v. *West., etc., Tel. Co.*, 96 U. S. 1. It was never intended to enlarge the powers of foreign corporations in such sense as to permit them to do business in other States when their charters prohibited it or did not authorize it to do so.

A case exactly in point with the case at bar (under the same or like statutes of Louisiana as those involved herein), is that of *South Western Telegraph Company* v. *K. C. S. & C. Railway Company* (108 La.) 32 Southern, 958, in which it appears that the Telegraph Company was organized under the laws of the State of Texas, and its charter provided that it could build lines between certain points in Texas. It also appears that it had complied with the laws of Louisiana relative to foreign corporations

transacting business in that State, and that it was attempting to build a telegraph line from a point in Texas to a point in Louisiana and sought to exercise the power of eminent domain against a railroad company in the latter State. On account of the importance of that case, decided by the highest court of Louisiana, and placing an authoritative construction upon the statutes here involved, we quote freely therefrom, as follows:

> In a supplemental brief filed in this court it is suggested by defendant's counsel that the plaintiff's charter gives it the right to operate only in certain named counties in the State of Texas, and hence that it is without power to carry on business or to expropriate property elsewhere. To this, counsel for plaintiff reply that the suggestion is in the nature of an objection to the capacity of the plaintiff to bring this suit, and that it comes too late. The question presented, however, goes beyond that, and rests upon the proposition that by the evidence offered in support of its demand the plaintiff has shown that it is not entitled to the relief sought, since it thereby appears that it is without legal capacity to come or to operate its lines, and *a fortiori* is not entitled to expropriate, within the State of Louisiana; and the issues involved in this proposition are raised by the original pleadings. Thus, conceding that the plaintiff's corporate existence and its compliance with the law of this State relative to foreign corporations should, in the absence of specific challenge, be presumed, it would still be necessary, in the face of even a general denial, or if the case were before the court for

confirmation of a default, to establish by proof that it is within the category of corporations which, under the law creating them, and under the law of this State, are authorized to operate and to exercise the power of eminent domain here, since there are many corporations established under the law of Texas and of other States and countries which are lawfully created, and might comply with the law relative to foreign corporations, but which do not fall within that category. The mere failure of the plaintiff to make such proof would therefore be a failure to make out its case; and affirmative proof of a contrary character would, of course, be equally fatal.

Considering the question presented, then, upon its merits, it is axiomatic in the jurisprudence of this country that the comity, agreeably to which a corporation created by one State or nation is permitted to conduct its business within the territory of another, does not extend so far as to permit the exercise by the foreign corporation of powers that are in contravention of the public policy of the State in which such business is conducted, or that are in derogation of common right. And as the power of eminent domain is of the latter class, it follows that it can not be exercised by a foreign corporation as a matter of comity, but only by virtue of an express grant of authority from the State in which it is exercised. Recognizing this fact, the General Assembly in 1880 passed an Act (No. 124 of that session) which confers upon corporations 'chartered or formed under the laws of this State or any other State, or under the laws of the United States, for the purpose of transmitting intelligence

by magnetic telegraph, or telephone,' etc., the right to establish lines in this State, and for that purpose to expropriate property. It can readily be understood, however, that this statute can have no application to a case where, by the law creating it, a corporation established by another State, or by the United States, is prohibited, whether in express terms or by implication, from operating in Louisiana. It is for the government creating a corporation to determine primarily, and within the limits of its own authority, what powers shall be exercised by such corporation, and where it shall exercise them. The authority of a State does not extend beyond its own boundaries, and hence no corporation created by such State can, by virtue of its authority, exist or transact business beyond those limits. If a State, in creating a corporation, imposes no territorial restrictions upon its operations, the question whether it can lawfully operate in other States depends upon the comity existing between such States and the State of its creation, or, in the cases previously mentioned, upon specific legislation in the other States. If, upon the other hand, a State, in creating a corporation imposes territorial restrictions upon it, those restrictions are not affected by the laws of other States, enacted for the benefit of foreign corporations not so restricted. It was, no doubt, competent for the State of Texas to have established a corporation with general authority to construct and maintain telegraph and telephone lines, without limitation or specification as to territory. And such a corporation could have claimed the privilege of operating in Louisiana, because its creator had

authorized it to operate wherever it might be allowed, and because, being so authorized by its creator, it has the permission of the State of Louisiana. But it was equally competent for the State of Texas to have established a corporation for the purpose of operating in one of its own counties, wards or municipalities, and to have conferred upon it authority to operate only within the territory designated; and the corporation so created could have operated nowhere else, for the reasons that, existing only within the limits of the law creating it, it could have had no capacity to violate that law, and that neither the comity nor the laws of other States upon the subject of foreign corporations could have been invoked in its behalf, since it would be inadmissible to suppose that the other States would undertake, either by comity or statute, to regulate a Texas corporation in a manner at variance with the law of its creation. The plaintiff's charter, offered in evidence on its behalf, provides, to quote the language, that 'the purpose for which this company is formed is for the erection, maintenance and operation of telegraph and telephone lines in Jefferson, Hardin, Orange, Newton, Jasper, San Augustin, Sabine, Liberty and Shelby Counties, and for the purchase and sale of such goods, wares, and merchandise as may be used for said business.' According to its own showing, therefore, plaintiff must confine its operations within the nine named (out of probably 250) counties in the State of Texas; and according to the same rule of construction by which this conclusion is reached, it can operate nowhere else, since the enumeration of the counties, to operate within which it is created,

excludes all other places, as well as the remaining counties in Texas. And to hold that the Louisiana statute of 1880 has the effect of conferring upon the plaintiff authority to erect, maintain and operate telegraph and telephone lines in Louisiana would be to hold that the State of Louisiana has undertaken to remove a competent restriction placed by the State of Texas upon a corporation created solely by its authority. * * *

The fact that the plaintiff corporation was established for the purpose of carrying on business within certain specified counties in the State of Texas is irreconcilable with any theory of authorization, express or implied, to conduct such business in Louisiana; and the Act of 1880, which is relied on as conferring that authority, for the reasons stated, has no application.

It is therefore ordered, adjudged and decreed that the verdict and judgment appealed from be annulled, avoided and reversed, and that the demand of the plaintiff be rejected, at its cost, in both courts.

It is clear that the court below erred in not following that decision of the highest court of Louisiana construing the statutes under which the Telegraph Company claims the right to condemn the lands of the Railroad Company in this case.

The District Court erroneously held that the Act of Congress of July 24, 1866, conferred on all telegraph companies the power and authority to acquire a right of way on and upon all post-roads or railroads, and to construct, maintain and operate telegraph lines thereon, and that this Federal Act supplied all that was lacking in the

charter powers of the Telegraph Company under the laws of New York.

It is axiomatic that a corporation proposing to condemn must show regular organization and a proper certificate of organization. *Mills on Eminent Domain*, Section 61. Any one whose property rights are sought to be invaded can raise the question.

In *Foster's Federal Practice* (4th Ed.) Vol. 1, p. 686, Sec. 207, it is stated:

> The charters of corporations are considered 'in the light of contracts made by the Legislature on the behalf of every person interested in anything to be done under them.' On account of the irreparable injury that would otherwise ensue, and in the case of corporations to whom the State's right of eminent domain is delegated, because they are trustees, the disobedience of a corporation to its charter may be restrained by injunction, at the suit either of the Attorney-General of the State to which it owes its existence, or *of any individual who suffers special injury thereby.* This rule applies whether the Act complained of has been forbidden expressly or merely by implication as not included within the powers expressly given to the corporation and those which are necessary for their proper exercise.

The cases above referred to establish the proposition insisted upon here, and in concluding the discussion on this point, we desire to say it is evident from this record that the Telegraph Company has no power to acquire or

operate a line over the railroad right of way involved in this litigation.

We insist these authorities and these reasons conclusively establish the first proposition, to-wit, that the Telegraph Company has no legal status in this proceeding, because it is seeking to condemn certain rights in the properties of the Railroad Company, when it never had the power to acquire these rights by condemnation.

Second Proposition. If it be true that the Telegraph Company can not insist on exercising the sovereign power of the State of Louisiana, that is the power of eminent domain, for the reason that it is not in a position to comply with the obligations that go with it, the next question is, can that question be raised by any party other than the State.

There can be no doubt that ordinarily the power of the corporation can not be collaterally attacked; but one of the distinct exceptions recognized by almost every court in the country, including this court, is a case in which a corporation is seeking to take by expropriation proceedings the property of a person or another corporation by virtue of its alleged corporate powers.

> *Orrick School District* v. *Dorton,* 125 Mo. 439.
> *New York Cable Co.* v. *New York,* 104 N. Y. 1, 43.
> *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1, 22.

It is, therefore, confidently asserted that there can be no serious doubt that in an eminent domain case the property owner may inquire as to the power of the

corporation to conduct the business for which it is seeking to condemn the property.

This is true, because the property owner can not be compelled to part with his property, except for a public use; and if the corporation seeking to take his property from him, even though under the guise of a public duty, is so bound and restricted by its own charter limits as to be unable to perform a public service if the question is raised, then the landowner is being deprived of his property for a private purpose, and not for a public purpose.

One of the cases in which the question is elaborately discussed is that of—

> *Zanesville Gas Light Co.* v. *City of Zanesville,* 27 Ohio 35, 23 N. E. 60.

There the question was expressly raised as to whether a party, other than the State, could question the corporate authority, or right of a corporation to exercise its corporate powers, and the distinction between a *quo warranto* proceeding, which is a proceeding brought for the benefit of all of the people, and the defense made by one whose property was being taken, was clearly pointed out.

In speaking of the distinction, the court said in reference to the *quo warranto* proceeding:

> The purpose and object of this proceeding is to determine the question, once and for all, and by a judgment that will be binding upon all. It is not a judgment based upon a wrong of the company against any particular individual, but on a wrong against the entire public—the wrong of usurping the

> prerogatives of the people; and, if found guilty, the judgment is one of ouster, in favor of the entire public. There are evident reasons for limiting a jurisdiction so drastic in its consequences to courts composed of more than one judge, that do not apply to suits of a private character, and that can only affect the parties to them, whatever may be the judgment.

Then going to the other phase of the question, the court said:

> The franchise of a corporation of the power of eminent domain, or any right or privilege that a corporation may claim, may be, and frequently is, questioned by a private individual, whenever involved in litigation between it and the individual. * * * The right of any one involved in litigation with a corporation, to question its claims results as a corollary from the capacity conferred on it to sue and be sued. Such a franchise does not carry with it the franchise of a privileged suitor. The capacity to sue and be sued implies power in the opposite party to question the claims of the one clothed with such capacity. If it were otherwise, a private individual would be at great disadvantage in litigation with a corporation.

In the case of *Boca* v. *Sierra Valley R'y Co.*, 2 Cal. App. 546, 84 Pac. 298, we have an interesting discussion of the question. One railroad company sought to condemn two crossings over the branch road of another railroad company. The company over whose tracks or right of way was sought to be condemned raised the question as to whether the railroad was authorized to condemn, under its articles of incorporation, and the precise ques-

tion was as to whether the points between which the railroad was to be constructed had been properly provided for by an amendment. An amendment had been sought, but had not been properly filed with the Secretary of State.

The court held, in the first place, that the amendment had not been properly made at the time the condemnation proceeding was instituted, and therefore the condemning railroad had no power to build the branch lines.

The point was made, however, as against the defendant, that the question could not be raised in that proceeding, but the court said:

> The corporate existence was alleged and admitted; no question of *de facto* corporation arises. The allegation of the complaint is that 'plaintiff is a railroad corporation duly incorporated and existing under the laws of the State of California,' and this averment is admitted. The question is one of law alone, and we know of no such thing in law as a *de facto* power. There is such a thing as the exercise of power by a *de facto* corporation. The corporation, in condemnation proceedings, acts as the agent of the State. The power to condemn may be delegated by the State, to any corporation or individual who shall comply with the terms upon which the right is given. * * * No one questions the right of a duly-organized corporation under the laws of the State, to condemn rights of way over lines of road stated in its articles as required by Section 291, Civil Code; but it can not exercise this power as a duly organized corporation and at the same time exercise like power as a *de facto* corporation over branch or

other lines of road not stated in its articles. Plaintiff can not exist as a corporation and condemn the east crossing, as we have held it could, and in the same action ignore its *de jure* or statutory entity, and claim the right to condemn the west crossing as a *de facto* corporation. Whatever its powers may be to condemn, they can not exceed those given by its charter. It would be strange, indeed, if, as a corporation *de jure,* it could not condemn under its charter and yet could do so as a *de facto* corporation. * * * There is an obvious distinction between a challenge to the corporate existence, and a challenge to the power which may be exercised by the corporation, whether it be a *de facto* or a *de jure* corporation. In the former case the general rule is (with exceptions) that the corporate existence may not be attacked collaterally; but it has always been held that the *ultra vires* acts of the corporation may be thus challenged, often by the corporation itself. This rule would apply as well to a *de facto* corporation as to one *de jure.*

In the case of *Atkinson* v. *Marietta & Cincinnati R. Co.,* 15 O. St. 21, in speaking on this point, the court said:

> Corporate existence and the power to take private property for public use, can only be derived from legislative enactment. A grant of both are made indispensably necessary to the employment of the process invoked in this proceeding. Before a company can command a judgment of condemnation, it must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which the law has annexed to the exercise of its powers. How this may be proved, and under what circumstances those who have dealt

with it as a corporation may be estopped to deny its corporate existence or powers, it is not material here to inquire.

The same proposition was announced in the case of *Atlantic & Ohio Railroad Co.* v. *Sullivant, et al.*, 5 Ohio State, 276, where it was held in a condemnation proceeding, it was incumbent upon the company, in order to show its right to make the appropriation, to give evidence of a certificate and public record of its organization in strict compliance with the requirements of the law.

As to the power to question the *ultra vires* acts of a corporation attention is particularly called to the decision of the Supreme Court of Tennessee, delivered by Judge Lurton, in the case of *Marble Co.* v. *Harvey*, 92 Tenn. 113.

It is very clear from the foregoing authorities that the Railroad Company, whose property is sought to be appropriated under the power of eminent domain, can deny the corporate power of the Telegraph Company to take its property on account of the latter's failure to comply with the fundamental laws of the State to which it owes its creation, and that the Railroad Company is not estopped to make this question on account of a contract entered into with it over twenty-five years ago. This is the first occasion that it has had to raise the question, because the Telegraph Company has during that time been on the Railroad Company's property as lessee, and has never asserted any rights hostile to the latter company, but the Telegraph Company has seen fit to can-

cel the contract, and is attempting to continue its line upon the railroad right of way by condemning the right to do so.

If the doctrine of estoppel was applicable at all on account of the prior contract between the two companies, it could only be applicable as to the enforcement or non-enforcement of that contract, but the Telegraph Company has terminated the same of its own volition, and it is not in controversy in this suit.

It is not denied that the Telegraph Company was validly organized under the Act of 1848 and the amendment of 1853, but the answer denied its power to acquire property in the States traversed by the Railroad Company under the power of eminent domain *between points not designated in its charter.* It is denied that the Telegraph Company accepted the provisions of Section 3 of the amendatory Act of 1862 by filing with the Secretary of State of New York within one year after the passage of the Act a certificate, executed by two-thirds of its directors, amending its certificate of incorporation so as to cover its lines of telegraph acquired prior to the date of the passage of that Act, and it is denied that it accepted the provisions of Section 2 of the Act of 1862 by filing in the office of said Secretary twenty-five years or more ago, when it constructed or acquired the line within the State of Louisiana, a certificate describing the general route of such line or lines, designating the extreme points connected thereby, in the same manner as provided in the original Act. This provision in the Act of 1848 was mandatory, and as the Act of 1862 was

amendatory of the Act of 1848, its provisions as to designating the termini and route of after-acquired lines is also mandatory. The court will notice that there are five essentials to a valid certificate of organization under this Act of 1848. First, the name; second, the general route of the line of telegraph, designating the points to be connected; third, the capital stock, etc.; fourth, the names of the shareholders; fifth, the period for beginning and terminating its charter existence, acknowledgment of certificate, and filing the same in the office of the Secretary of State. The Act then says that upon complying with these provisions, such association shall be a body corporate, etc. These are the conditions precedent to a valid incorporation, are vital to its corporate existence, and there can be no valid corporation without a strict compliance with the same. If it extend its lines under the amendment of 1862, it must file an amendment to its certificate of organization *within twelve months after* the construction or acquisition of its lines, which means, of course, not *later* than twelve months after the construction of its lines. It can be filed before the property is acquired, or before the extension or construction is made, *but it must not be later than twelve months after the acquisition of the additional lines or the construction of same.*

It may be insisted that this requirement of the amendatory statute is in the nature of a condition subsequent.

> There is a clear distinction with respect to the organization of corporations between such requirements of the statute as are intended as conditions precedent to the creation of a corporation, and such

as are intended as conditions subsequent merely. Failure to comply substantially with the former will, as we have seen, prevent legal incorporation. Compliance with the latter, however, is not required in order to give the association corporate *existence*, but is required, after corporate existence has been acquired, to entitle it to legally continue and act as a corporation.

Clark & Marshall on Private Corporations, Sec. 73, p. 206.

On page 300 of the same work it is said:

As was shown in a former chapter, the *existence* of a corporation is not affected by its failure to perform conditions subsequent. As soon as an association has accepted a special act of incorporation, creating it a corporation *in praesenti*—and an acceptance of such an act, as we have seen, may be presumed—or as soon as conditions precedent have been complied with in organizing under either a general or special law, and corporate existence has been thus acquired under the law, corporate faculties and powers attach to it, although it may not have commenced active business operations, and although conditions subsequent may not yet have been performed. *Until the performance of the conditions subsequent it may have no right to commence business*, but it is nevertheless, a corporation, and has corporate powers and faculties.

This authority is only applicable to the regularity of the formation of the corporation, but that is not an issue in this controversy, as it is conceded that the Telegraph Company was regularly organized in the beginning. If

we assume that Section 2 of the Act of 1862 is a condition subsequent to the acquisition and extension of other lines than those enumerated in its original charter, in that event the Telegraph Company may have had the right to contract for and make extensions in other territory than that named in its charter, but it would have no right to *continue to maintain and operate such lines and extensions after the lapse of one year from the acquisition or extension.* We insist that when the amendatory Act of 1862 is construed in connection with the provisions of the original Act of 1848, whose provisions require a description of the route and designation of the termini, as a condition precedent to a valid incorporation, this requirement as to future acquisitions and extensions is also mandatory, and is a condition precedent to validating such acquisitions or extensions in conformity and in harmony with the original amendatory provisions under which it was incorporated and to which it owes its corporate existence, its corporate powers and corporate rights. This certificate is an amendment to its charter and becomes a part thereof, and it is the only way in which the extension of its lines in other States can be validated and rendered effectual. The Legislature of New York gave to it the power to extend its lines to points not described in the original certificate of organization or charter by providing that it could go ahead and make its extensions, but that in order to amend its charter so as to cover the extensions it must file an amended certificate describing such new lines or extensions within one year thereafter, which it has never done.

In construing the Telegraph Company's rights in these proceedings for condemnation, it should not be overlooked that it is doing business in these various States as a matter of comity, and not as a matter of right (*Railroad Company* v. *Koontz,* 104 U. S. 5); that the right of eminent domain is in derogation of common rights, subverts the usual attributes of the ownership of property, and must be strictly construed (*W. U. Telegraph Co.* v. *Pa. Railroad Co.,* 195 U. S. 540); and that in construing the powers of a corporation they must always be most strongly construed against it (*North Western Fertilizing Co.* v. *Village of Hyde Park,* 97 U. S. 659).

It will be noted that the object of the condemnation proceeding instituted by the Telegraph Company in Louisiana as shown by the record in this suit, is *to continue the operation and maintenance of the lines upon the same location where they were constructed under a contract more then twenty-five years ago, which contract has expired.* It is not, therefore, in any sense a new acquisition or a new construction on the part of the Telegraph Company, but is merely an invocation to the courts to allow it to continue to operate its lines against the consent of the Railroad Company between points where it has no charter power to construct, operate or maintain telegraph lines.

Third Proposition. It is apprehended, however, that it may be insisted by the Telegraph Company, that while it is true that the laws of New York do require the charter to be so amended when lines are constructed or acquired; and while it may be true that nothing else ap-

pearing, no right of eminent domain would exist in this case, yet in view of the fact that the statute of 1862 provides that this certificate may be filed within twelve months after the extension is made, that the Telegraph Company can exercise the right of eminent domain upon the theory that *after* the right is acquired, it will amend its charter within twelve months from the time of acquiring the property.

It is true that the Act of 1862 provides as follows:

> In case any company, incorporated as before mentioned, shall become the owners or lessees of, or engaged in the construction, use, or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall become lessee of any such line or lines, such company, *within one year after* constructing or becoming such owner or lessee, or after joining with any other corporation or association in such construction, leasing, or ownership, or after acquiring any other interest in such line or lines, shall file in the office of the Secretary of State of this State, a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section 2 of the Act hereby amended.

Thus it appears that the State has given its permission to the Telegraph Company to acquire the line of another company by purchase, or by lease, or to construct and maintain a line beyond the limits of its char-

ter, provided that it will, *within twelve months*, amend its charter as set out above.

All that this can mean is that permission is given to the Telegraph Company to take the preliminary steps toward the extension of its line, without being guilty of an *ultra vires* act, and without violating the provisions of its charter. But it could never be said that until the amendment was made, any real authority or franchise was vested in the Telegraph Company as against the public.

Otherwise, it would always be within the power of a telegraph company, whether exercising the power of eminent domain or any other franchise beyond the limits of its charter, to defend upon the ground that it is *intending* within twelve months to file a proper amendment. This it may or may not do. It is purely discretionary whether the Telegraph Company will ever execute and file such a certificate. Meantime we insist before it can condemn the Railroad Company's property for its use, it must have power *at present* to do so. That power can not be exercised until actually obtained nor upon a contingency that has not happened and may never happen.

It is the statute which must give it the power—the corporate power. It is the statute that must give it the right to exercise the sovereign power of eminent domain; and certainly it can not be fairly said that that right is a *vested* right until these preliminary arrangements shall have been finally completed. It is so then, only in matters of contract, looking toward the acquisition of prop-

erties for the purpose of extensions, ultimately to be covered by the franchise as amended, that these provisions were made.

It is manifest from a reading of the New York statutes and the charter of the Telegraph Company that the latter has struggled vainly against the barriers of its charter. That instrument, constituting the contract between the corporators, carefully guarded against extensions without full notice to all stockholders and the written assent of two-thirds of their number. And yet we find that this mutual contract, restricting operations to a line extending to St. Louis, was violated in 1864 by a deliberate announcement of the intention of the Board of Directors to extend operations to Louisville; and since that time, grown bolder by immunity, this corporation, without even the formality of a resolution of the Board, now seeks not only to operate thousands of miles beyond Louisville, but the aid of the courts in this enterprise. It seeks such aid on the theory that statutes of the State of New York have dissolved the restrictive portion of the contract between subscribers constituting its charter. If this could have been done by a legislature without the assent of stockholders, why could not the entire charter have been repealed, or the entire purpose of the corporation changed? What security, under such theories, would minority stockholders have against the Acts of any legislature? We respectfully submit that a corporation organized to construct a telegraph line from New York to St. Louis has no more standing in court to expropriate property in Louisiana than has a corporation

organized for manufacturing purposes; geographical limitations being every whit as binding as limitations to specified objects; indeed, more so, for concerning geographical limitations there can be, in such a case as this, no misunderstanding, no confusion.

From all that has been said on these propositions, it seems clear that the Telegraph Company had and has no *existing* corporate power or capacity to maintain this suit to expropriate the private property of the Railroad Company situated in the State of Louisiana.

VI.

THE TELEGRAPH COMPANY HAS NO POWER OR AUTHORITY TO EXPROPRIATE ANY PART OF THE RAILROAD COMPANY'S BRIDGES ACROSS NAVIGABLE STREAMS OR WATERS IN LOUISIANA.

This proposition, it would seem, needs no argument in its support. The Act of Congress, approved July 24, 1866, known as the Telegraph Act, does not refer to *bridges* across navigable streams or waters. The permission therein granted to any telegraph company that shall accept said Act is to "construct, maintain and operate lines of telegraph * * * over, under or across the navigable streams or waters of the United States: *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters." A telegraph company can not, by virtue of any State enactment, condemn for

telegraph purposes the use of a bridge constructed, maintained and operated, under and in accordance with the laws of Congress, across a navigable stream or water of the United States. Indeed, the Louisiana Act, fairly and reasonably construed, does not, it seems to us, undertake to grant the power of eminent domain to a telegraph company to expropriate for its use any part of a bridge over a navigable stream or water. Yet the District Court and court below erroneously allowed such expropriation to be made thereunder.

In *United States* v. *Monongahela Bridge Co.*, 160 Fed. 712, 722, the court said:

> The authority of Congress over bridges upon navigable waters, as it is there shown, is derived from the power given to it by the Constitution over interstate and foreign commerce, and this of necessity includes the right to determine what shall or shall not be considered unreasonably obstructive to free navigation, and to require a removal or alteration of that which is, to the extent that it is found to be so.

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners holding under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution It is, therefore, impossible to escape the conclusion that the Telegraph Company claims a right which can not be claimed otherwise than under the Acts of Congress enacted in pursu-

ance of the power and jurisdiction of Congress over the navigable streams and waters of the United States.

That the streams and bodies of waters crossed by the Railroad Company's bridges in Louisiana are navigable is averred and admitted in the Telegraph Company's petition, and amply proven by the testimony on the trial.

Furthermore, the courts take judicial notice of what streams and waters of the United States are navigable and under the exclusive power and control of Congress.

United States v. *Lawton,* 5 How. 10, 26.
The Daniel Ball, 10 Wall. 557, 563.

In the case of *Kansas City Southern R. Co.* v. *Kaw Valley Drainage District,* 233 U. S. 75, it appeared that appellee, assuming to act under authority conferred by the laws of the State of Kansas, ordered certain railroad companies to raise their bridges over the Kansas River, a navigable stream, which said railroad companies refused to do. This court held the existing railroad bridges over a navigable stream formed necessary parts of lines of interstate commerce, and could not be altered by a State Court without authority from the Secretary of War. Upon the same principle there announced by this court it is clear the State of Louisiana can not by statute authorize the condemnation of any portion of the railroad bridges across navigable streams in that State for the use of telegraph poles, wires and fixtures, thus placing a burden upon and interfering with such bridges, which are necesary parts of lines and instruments of interstate commerce, and must be erected, maintained and operated

under the rules and regulations prescribed by Congress and the Secretary of War.

Under Section 9962, Mallory's Com. Stats. 1913, hereinabove cited, as we construe it, the United States reserves and has the absolute right, without charge therefor, by the owner of the bridge and its approaches, to construct, maintain and repair its own telegraph and telephone lines across and upon such bridge and its approaches. But when it comes to other telegraph or telephone companies, the owner of such a bridge and its approaches shall not discriminate between them, and if the privilege to use the same is voluntarily granted to one of such companies, an equal privilege is to be granted to another like company that may apply therefor. In other words, the granting of exclusive privileges to use such a bridge and its approaches for telegraph or telephone lines is prohibited. The owner is not bound by the terms of said Section 9962 to grant such privilege to any privately owned telegraph or telephone company performing a public service as a common carrier of messages for hire.

That Section of the Act of March 23, 1906, like the Act of July 24, 1866, is to be construed as merely permissive, as Congress did not thereby undertake to vest in privately owned telegraph or telephone companies an absolute right to use such bridges and their approaches or the power of eminent domain to acquire by compulsory means such use from the proprietors thereof.

VII.

THE DISTRICT COURT ERRED IN NOT SUSTAINING THE RAILROAD COMPANY'S MOTION, UPON THE WHOLE EVIDENCE, FOR A DIRECTED VERDICT BY THE JURY IN ITS FAVOR.

At the conclusion of all the testimony offered or introduced at the trial counsel for the Railroad Company made a formal motion for a directed verdict in its favor, which the court overruled, and to this ruling a bill of exceptions was reserved on the grounds stated in the motion. (R., 142-3, 144; Bill of Exceptions No. 1, R., 229-30.)

We have already discussed all of the five grounds on which this motion was based, except the third, which is as follows (R., 229-30):

> The undisputed evidence shows that the proposed expropriation will interfere with the operation of the defendant as a post-road and an interstate common carrier of freight and passengers and as a commercial telegraph line.

This motion, and particularly the third ground thereof, is covered by the Second Error assigned on this writ of error. (R., 252.)

Now what did the undisputed testimony on the trial establish with respect to interference? The first and most serious interference consists in the uncontradicted fact that the location sought to be condemned is that selected by the Railroad Company for its own telegraph

and telephone line on its own right of way. Its preferential right to such location has been discussed by us in another part of this brief, and sustained, as we maintain, by both reason and authority, as well as by the principles of natural justice. On that identical location the Railroad Company has had its own wires erected and used them for more than twenty-five years for the transmission of messages in the transaction of its railroad business, the operation of its trains, etc. On the existing poles in that location (as shown by the Telegraph Company's own witnesses) there were at the time of the trial 25 wires (R., 82, at bottom). Of these, 18 are used by the Telegraph Company for its purposes, and the other 7 (4 telephone and 3 telegraph) are used by the Railroad Company. (R., 87, at bottom; 94, at top.) The existing line is cheaper to construct and maintain, and there are places along the right of way where another telegraph line could not be constructed without great expense. (R., 95.) Put in narrative form the testimony of the Railroad Company on the matter of obstruction and interference may be stated as follows:

W. H. Courtenay, Chief Engineer, testified in substance that (R., 104-117) there would be interruption to the movement of trains by reason of poles and wires blowing down; the Telegraph Company will use the railroad tracks and roadway for its materials used in construction and repair. Trains have to look out for such impediments and there is danger of obstructions being left on the track; telegraph lines frequently occupy space needed for railroad construction; in reducing grades and

constructing second track or repairing tracks, it is necessary to have wires moved before such work can be done, resulting in delay and additional cost; in Louisiana the Railroad Company is put to extra expense in maintaining the bridge and trestle structures on account of the telegraph lines on them. At Rigolets bridge the telegraph wires are supported by the piers of the bridge and the poles are braced from the cross-ties; computations show the wind pressure on the girders of that bridge is increased 15%, because of the impact of the wind on the wires and poles; the overturning tendency of the poles on the piers is increased 30%; certain other trestles have suffered damage because of the effect of the poles on them; these poles and wires are very greatly in the way when it becomes necessary to make any repairs to the bridges; this occurred in the disastrous storms in 1909 and 1911, which destroyed a considerable portion of the Rigolets bridge; in replacing cross-ties additional expense has to be incurred on account of the presence of the telegraph lines which are in the way; when additional piles have to be driven by pile-drivers the wires are in the way and have to be moved before the work can be done; it would not be practicable for the Telegraph Company, if it expropriated a strip the width of the arms and the width for guys, 10 to 16 feet, considering the condition of the country through which the right of way runs, for the purposes of supply, to drive along such strip; to do that it would be necessary to fill up large quantities of marsh and water and make a road; the only way to reach these poles now in many instances is by going di-

rectly from the roadbed of the railroad; it is now necessary to go across the track to the side to each pole, so that substantially all the side of the right of way where the poles are placed would be used from the track; it would not be possible to construct railroad tracks under the arms of the telegraph poles; the danger of imperiling employes and passengers would be too great; for safety's sake the poles should be planted on the margin of the right of way at least 30 feet from the track, assuming the poles to be 30 feet long; some of the poles are now much closer to the track than that distance; if the Telegraph Company acquires the right of way sought, it will be possible for the Railroad Company to construct a telephone or telegraph line of its own on its right of way, but at a greater cost for construction and maintenance; but it would be impossible for the Railroad Company to put another line on the same strip occupied by the Telegraph Company; the trains of the Railroad Company are now handled by telephone service in Louisiana; its telephone wires are on the Telegraph Company's poles; there were eight spans of the Rigolets bridge destroyed by wind storms in 1909 and 1911, resulting in an expense for repairs of $220,000; in construction railroad bridges are designed for three kinds of loads, the weight of the structure without the train, the train weight and the wind load; the cost of constructing the Rigolets bridge as it stands now is $243,000; trestles get out of line more where telegraph lines are placed on them. The Railroad Company ordered its employes, the order came to me as head of the maintenance of road department, also to a

representative of the transportation department and chief operator, to locate for the Railroad Company a line of poles for a telegraph and telephone line for its own purposes; such location was made; W. G. Brown, Road-master of the New Orleans Division, and R. R. Hobbs, Chief Operator, were instructed by me to locate a line of poles and wires for the Railroad Company's use, which they did; they located a line substantially the same as that now occupied by the Telegraph Company. Being asked the reason for that choice, he stated (R., 117-118):

> The most important is that on nearly the whole length of this line between Micheaud and Pearl River on the north side of the right of way there is a canal, from which the material was excavated for the original construction of the embankment. If such a line were put parallel to the track and north of this canal, we would get in much softer marsh, and it would be impossible to get the material for construction and repairs across the canal and intervening strip of marsh without much trouble to the line of poles and wires north of the canal. The ground is much better where the present line of poles and wires of the Western Union, south of the track, is constructed than elsewhere for this reason. The railroad through that marsh is constructed over very soft ground, and preparatory to raising the embankment we had soundings made to ascertain the depth to which the material originally placed had subsided below the marsh level. These soundings were made by Mr. Brown. They disclosed the fact that the material which had been placed in the construction of the roadbed had squeezed out laterally a considerable

distance. The location at present occupied by the Western Union's poles, south of the track, is on ground that has been made firmer and strengthened by reason of this material having been placed in the Railroad Company's embankment. If a line of poles and wires be placed south of the existing line of the Western Union Telegraph Company, it will get in very much softer ground. The nature of that material or soil for a depth of about fifteen or sixteen feet below the surface of the marsh is oozy marsh, and nearly all of the existing poles have to be guyed. If you place poles and wires still further south, the anchorage would be more expensive. It would require better anchorage and better guys, better 'dead men,' as they are called, attached to the guys. In a great many places along the road, for example at Dunbar, where the Little Rigolets comes very close to our track, a telegraph line could not be placed further south than this existing without getting into very deep water. At Rigolets Station the water of Lake Borgne also comes in very close. Unknown Pass comes in very close at Lake Catharine Station. Lake Catharine itself comes in for a considerable stretch close to the road. At these points the Western Union location is far and above better in advantage than any other line, for it would be necessary to locate a new line south of the existing line in deep water in many places.

Courtenay further testified (R., 121-125), the telephone wires used in the operation of the railroad and attached to the Telegraph Company's poles on the railroad right of way would have to be moved and another location found for them, should the Telegraph Company acquire

the exclusive right of way it seeks; the two representatives of the Railroad Company in locating the latter's line for telegraph and telephone purposes went over the line on special trains for that express purpose, and reported on their location.

There would be too much conflict for the Railroad Company to occupy the same territory or location; it is not an unusual occurrence for wires to drop down; there would be a great deal of danger of the existing wires coming in contact with the new poles; there would be many objections to such an arrangement, although it is not structurally impracticable; there would be so many objections, they would not want it, but would want different locations; I have never known it to be done; if the wires were put above the old wires it would mean lofty poles, exposed to the wind, with a great leverage, increased anchorage and require a great deal more expensive construction; to put another pole line between the present one and the track, using shorter poles, would give rise to endless trouble; the marsh grass grows very tall, and at certain seasons it is common custom to fire such grass through the marshes; great energy has to be used to prevent the grass on the railroad right of way from becoming ignited, in which case the wires would be put out of commission; the cross-arms of the existing line, being ten feet wide, would make the new line of poles come 5 feet nearer the track, and if they blew over they would foul the track; a passenger train might thus become derailed and create a disaster; the higher the poles the more anchorage is required and the greater

the danger of falling down; the two lines of poles and wires, if they occupied separate locations, to avoid danger of the poles of one line striking those of the other, should be 24 feet apart; there would not be room between the line of poles next to the track and the track to comply with the conditions referred to; the Railroad Company has four telephone wires on the existing poles and, in addition, on part of the route it has signal wires that govern the draw-bridge signal; the Railroad Company burns its old worn-out ties on the south side of the right of way between the track and the present telegraph line, because there is no room on the north side between the embankment and the canal; to cross the canal would be expensive for that purpose, costing 3 or 4 cents a tie, for an average of 150 ties per mile annually.

W. G. Brown, Roadmaster, testified in substance (R., 120-21) that within the six months preceding the trial the line was located by him and Chief Operator Hobbs; they selected the route, going over it, and located the same on the right of way maps, which is practically the same route now occupied by the Telegraph Company, because it was the best, and on the best and firmest ground, away from the canal existing on the north side of the track.

A. R. Fugina, Signal Engineer, testified in substance (R., 125-127) that the block signal system is considered much safer than the telegraph system; for such signal system it is very much better to have the wires on a separate pole line, because there is considerable interference with the Telegraph Company's wires, which

fall on the signal wires, and the tendency to cross up the latter wires, making short circuits; these cases occur frequently, and consequently delay operation, interfering with signals; it is much preferable to have separate pole lines and safer insulation; with the increase of automatic signals the separate pole line becomes more important; the Railroad Company is embarking on an extensive plan of automatic signals, which are being put in quite fast, and in a short time it will have such signals over a great part of its system, especially the more important lines, such as the one in Louisiana. (It may be here stated this line forms a part of the main line of the Louisville & Nashville Railroad between Cincinnati and New Orleans.)

This witness further stated the Railroad Company had been using block signals 12 or 15 years, most of them attached to telegraph poles, but it was then constructing its own pole line therefor on the Knoxville Division, orders for which had been received in April, 1912, and construction work had been started for several months; in the event the Railroad Company should establish a separate telegraph line of its own along its right of way in Louisiana its signal wires would be put on it; the wires used for railroad business purposes are only a few, 6 or 7; the Telegraph Company has a very heavy line, in some places 40 to a pole, and accordingly the interference is very much more; that company is constantly changing wires and breaking the circuits of the Railroad Company; every time the Telegraph Company adds a wire to a cross-arm it puts the signal wire in interfer-

once, and the Railroad Company has to change its wires, which is another reason why separate pole lines are wanted.

Allen H. Sadler, Bridge Builder and Inspector, testified in substance (R., 227-9) that he built and reconstructed all the bridges and one-half of the piers of the Railroad Company along the Gulf Coast; in doing such work the telegraph wires had to be removed; the work could not be done with the lines where they were; the poles and wires were taken down, the wires taken away, and a cable laid across on the ties while the bridges were reconstructed; the effect of the wires on the ordinary repairs of these bridges is very bad from the fact that the piles can not be driven; take Bigoleta, for instance, in repairing the bridge there one-half of the piles could not be driven with the poles and wires in their present position; they would have been destroyed in the swing of the pile-driver in getting the piles in the proper location; in doing repairs, the extra work caused by these wires on the Bigoleta bridge, to drive the piles on the trestle would cost a dollar extra for each pile, and in the piers five dollars extra for each pile, on account of the long piles, and keeping them from destroying the poles and wires; there are about 1,200 piles in the Bigoleta bridge, of which 60 on an average have to be replaced each year, but storms have made it necessary to replace a greater number; in Louisiana the annual expense caused by wires attached to this bridge is $577, being the extra cost of driving the piles and damage to timber and fastening the poles to the piles and the cost

of moving the wires out of the way to do the driving.

Charles Marshall, Superintended of the New Orleans and Mobile Division, testified in substance (R., 129-136) that he had been superintendent of said division since September 1, 1886; he was familiar with the Railroad Company's right of way and properties along the same in Louisiana; the poles, with the guy-wires of the Telegraph Company, take up 30 feet of the Railroad Company's right of way or 15 feet on each side of the upright telegraph poles; on the north side of the right of way there is a canal, wide and deep, that runs along the railroad track; on the other side the ground is more solid for about 50 feet from the track than it is farther away; the Railroad Company is constantly building tracks and extending existing tracks, constructing and repairing buildings, establishing signal posts, and the Telegraph Company's poles and wires are in the way; the telegraph lines on the railroad right of way blow down and fall on and obstruct the track; it is necessary to remove them on the bridges so the repair work can be done; also for the employes of the Telegraph Company to enter into the use of the track and bridges; for the Railroad Company to take precautions against damaging the telegraph line by clearing space around every pole to prevent grass that might take fire and burn the pole; to use great care in burning old cross-ties so as not to damage the wires overhead; such timber must be carried over to the other side of the track or carried away from the telegraph line before it is burned, and in that way the telegraph line is a burden on the operation of the railroad; trains have

been interrupted by the falling of the telegraph lines on the track; the Railroad Company's employes have been delayed by the Telegraph Company's employes not getting out of the way in time for railroad work to be done after due notice. The Railroad Company's telegraph line was located by the Roadmaster and Chief Operator, under instructions from me after the receipt of a letter from the Chief Engineer April 20, 1912; the location was begun on that day and was indicated on the blue print maps of the right of way; the Railroad Company has no room at all to put a track on the same side of the right of way the telegraph line is now on; a space of 30 feet on the south side of the railroad right of way is taken up by the telegraph poles and the guy wire anchors, and 20 or 24 feet above ground numerous cross-arms 10 feet long have 25 wires on them; that 30 feet strip is wanted by the Railroad Company for its own telephone and telegraph and signal line for the operation of trains and the Telegraph Company's present line and structures are in the way; the present telegraph line was built originally by the Western Union about 1871.

The foregoing proof of interference and obstruction, resulting from the presence and perpetual continuance of an independent telegraph line on the railroad right of way, was practically in all essential particulars undisputed by the testimony of the Telegraph Company's witnesses on the trial. The chief of these witnesses (G. B. Straughn, District Foreman for Louisiana) admits the right of way sought to be expropriated by the Telegraph Company and needed for its purposes, including guy

wires or anchors, is 32 feet wide, for about 30 miles, and that no new line is proposed to be acquired. (R., 84-85.)

In *New Mexico* v. *United States Trust Company*, 172 U. S. 171, where a right of way had been granted to the extent of 200 feet on each side of the railroad, this court, at page 183 quoted with apparent approval from *Hazen* v. *Boston & Maine R. R. Co.*, 2 Gray, 580, as follows:

> The right acquired by the Railroad Company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically *exclusive.*

And in the same case this court, in like manner, from *Southern Pacific Co.* v. *Burr*, 86 Cal. 279, quoted at page 184, the following:

> Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and *unobstructed* whenever it shall have occasion to do so.

It seems impossible to avoid the conclusion (when the uncontradicted testimony at the trial is fairly and

impartially considered) that the motion for a directed verdict in favor of the Railroad Company should have been sustained, and the District Court erred in letting the case go to the jury on the question of damages. The serious and inevitable interference and obstruction to the ordinary and necessary use of its right of way for railroad purposes, resulting from the expropriation herein sought, is so manifest from this record that the District Court, as a matter of law, should have dismissed this proceeding.

Under the Federal Act of July 24, 1866, the occupancy of any part of a railroad by a telegraph company that interferes with the ordinary travel thereon is not permitted. So, under the State Act (Sec. 696, found in the Appendix to this brief), if valid for any purpose, no expropriation of any part of a railroad company's right of way for the use of a telegraph company is allowed if the ordinary use of the railroad thereon is thereby obstructed.

It will doubtless be claimed that such damages are capable of being compensated by verdicts. So also would be the absolute destruction of the railroad or the compulsory removal of the track as well as the railroad wires to another location. But the question is whether such burdens do not "interfere with the ordinary travel on such military and post roads," not whether the interference be great or small nor whether it be capable of a monetary valuation.

The Railroad Company, as we have seen, had a preferential right to the route sought to be condemned, and

the uncontradicted evidence shows that it is actually using and will continue to use such route and that the proposed expropriation will destroy such use.

The Telegraph Company having obtained under exigencies now long past, a very favorable contract and a very favorable route, asks the aid of the courts in maintaining it in that route after the expiration of the contract; and in response to the proof of interference with the operations of the Railroad Company, present and purposed, it offers the compensation of a verdict. The theory seems to be that violations of contract and statutes are immaterial so long as compensation is made. It is quite true that illegal damages may be compensated by a subsequent money payment, but to the discovery of illegality in the proposed proceedings, consisting of a manifest violation of charter limitations and of statutory limitations as to interference, arguments about compensation can afford no satisfactory answer. Such theories would reduce jurisprudence to a mere system of bookkeeping.

VIII.

THE INTERFERENCE OR OBSTRUCTION DESCRIBED AND ESTABLISHED BY THE UNCONTRADICTED EVIDENCE ON TRIAL IS NOT AVOIDED BY THE UNILATERAL AGREEMENT OR STIPULATION IN THE PETITION AND EMBODIED IN THE JUDGMENT.

In our statement at the outset of this brief, we called attention to that part of the petition (R., 6), in which the Telegraph Company undertakes to stipulate and agree that if at any time in the future, after the erection of its poles, cross-arms, and wires, or after the acquisition in this proceeding of the right to maintain the same as presently constructed, it should become reasonably necessary for the Railroad Company "to change the location of its tracks or to construct new tracks or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of the said right of way on which petitioner's poles are or may be set, petitioner will, at its own expense, upon reasonable notice from the defendant, remove the said poles, cross-arms, and wires *to such other point or points on the said defendant's right of way* as may be reasonably necessary in order not to obstruct the use by defendant of its property."

It will be noticed that even if this so-called stipulation or agreement were of any binding force or effect, there is no proposition by the Telegraph Company to remove its telegraph poles, wires, cross-arms, guys, an-

chors or other fixtures, should it succeed in its effort to condemn, except in the contingency that it shall become "reasonably" necessary for the Railroad Company to change the location of its *tracks,* or to construct new *tracks,* or side *tracks,* and for such purpose to use and occupy that portion of the right of way, where the Telegraph Company's poles, wires, etc., are or may be set. If it becomes "reasonably" necessary for the Railroad Company to construct, maintain and operate its own telegraph, telephone or signal line (as the proof and the nature of the situation shows undoubtedly it will), and, for such purpose, to use and occupy that portion of its right of way on which the Telegraph Company's poles, wires, etc., are or may be set, there is not the slightest pretense of an obligation assumed by the Telegraph Company to remove its poles, wires, etc., even to another part of the railroad right of way. This is true likewise in case the Telegraph Company needs the portion occupied by the Telegraph Company for the purpose of building stations, section houses, water tanks or other structures. Again, there is no proposition, in any event, to remove its poles, wires and other fixtures *entirely off the railroad right of way,* although there be an imperative necessity for the Railroad Company to use and occupy its whole available width for railroad purposes. Besides, what shall be "reasonably necessary" to make a change in tracks, or new construction of tracks, or what shall be a "reasonable designation" of the point or points on the railroad right of way, to which such removals shall be made, are open questions and would prove, in case of disagreement,

the fruitful source of lawsuits between the parties, resulting in delays, interferences and obstructions to the conduct of the Railroad Company's business and service to the public.

The Railroad Company was not bound to accept these so-called stipulations and agreements, and did not do so (see answer, R., 54), nor could they be lawfully used or considered by the court or jury on the trial to reduce the compensation in money for the land or easement therein sought to be expropriated, but they were erroneously so considered with that result.

These one-sided promissory stipulations amounted to this:

The Telegraph Company is seeking to invoke the power of eminent domain, which, in its final analysis, means that it invokes that power to obtain more than an easement, indeed, an exclusive and perpetual right to use and occupy certain portions of the Railroad Company's right of way or real property; but proposes to take the same under the power of eminent domain with certain conditions and stipulations of its own making solely, and to which the Railroad Company, the owner of the property, does not consent but objects.

In *Indianapolis, etc., Traction Co.* v. *Wiles,* 174 Ind. 236, 242, the court said:

> A proprietary right reserved in the owner of the fee and not appropriated is quite a different thing from a promissory stipulation made on its own motion by the condemning party. A landowner is not obliged to accept or be bound by such promises, but

may insist upon full pecuniary compensation for property appropriated against his will, together with resultant damages.

Mills on Eminent Domain, Ed. of 1888, Sec. 112, states:

> Compensation is ordinarily to be made in money, yet reservations of rights to owners are favored, and the condemning party may ratify an award, a part of which requires certain improvements to be made for the benefit of the owner. The reservation of rights to the owner is only carrying out the spirit of the law, that the public improvements shall be made with the least damage to private individuals. *These conditions and reservations can not be fixed against the will of the parties. The owners are not compelled to accept, or the condemning parties to grant the easement.*

In the case of *Toledo, etc., R. Co.* v. *Munson,* 23 N. W. 455, the jury in awarding compensation to the parties, awarded that the Railroad Company should construct a wagon bridge across the cut in the most convenient place. The court said:

> This they had no authority to do without the consent and agreement of both parties. They could neither bind the company to construct a wagon bridge, nor compel Munson to accept such service as part compensation for his land appropriated for the company's use.

The Supreme Court of New Jersey had the same point before it, and came to the same conclusion in the case of *State* v. *East Jersey Telephone Co.,* 38 Atl. 752.

In that case the Telephone & Telegraph Company undertook to condemn a right to use certain streets in the town of Bayonne. In the petition filed, the petitioner proceeded to stipulate its willingness to guarantee, accept, and abide by, all of the conditions and terms it had sought to embrace in a contract between itself and the city and the proposed contract was filed as an exhibit to the petition and made a part of it.

The court, in its order, granted the right to occupy the property, including the terms set out in the petition and its exhibit. Among them were these:

1. All post and poles should be placed so as not to interfere with the safety and convenience of travelers upon the streets.

2. The poles should be neatly shaven, well painted, and kept well painted.

3. No wires should be strung less than thirty feet from the ground.

4. The condemning party should place all parts or part of any sidewalks or sidewalk which might be displaced in the placing or erection of poles, and in case it did not do so, the city should have a right to do so, and charge same to the company.

5. The company should raise its poles whenever it became necessary to do so to permit persons transporting any building through the streets to pass safely.

6. The company agreed to idemnify and save the city harmless from all suits at law and equity on account of the location of such poles and wires.

7. *In case any authorized public or street improvement necessitates the changing of the location of said poles or wires, or any part thereof, said company will, at their own expense, change the location of the same to conform to such public or street improvement.*

8. The company agreed to furnish certain service, free of charge to the city, and certain other matters not necessary to be mentioned here.

The court said, in passing upon the question:

> There is no authority given by the statute to the Circuit Court for some of these requirements of its order, nor can we think of any way in which they could be enforced. Such requirements might very properly enter into a municipal ordinance, which, if accepted, would form a contract between the telephone company and the municipality, binding on both parties, but the Circuit Court has no power to make a contract. The power of the court to designate a route, is, indeed, discretionary, and we do not say that it may not impose as a condition precedent to its action, a tender by the company to the municipality of a contract embracing proper protection, and reasonable return for the privilege to be afforded, or make its designation conditional upon such a tender; but that it is very different from what is attempted in this case. It is argued that these *ultra vires* requirements of the order were at the voluntary concession of the company, of which the city of Bayonne need not avail itself unless desirable, and therefore should not be heard to complain; but we can not adjudge that they did not influence the discretion exercised in making the designation

> of a route, or the selection of the particular streets designated. On the contrary, we think that in legal presumption, they did influence that discretion, and, being unenforcible, must avoid the action based upon them. The order under review must be set aside, with costs to the city.

The Supreme Court of Ohio, in a later case, *State ex rel.*, v. *Toledo Home Telephone Co.*, 74 N. E. 162, held to the same proposition. There, the telephone company obtained certain rights in the streets of the city. One of the conditions incorporated in the judicial decree was that the telephone service should be furnished at a certain rate.

When the telephone company broke this part of the judicial decree, an ouster proceeding was brought against it, and the contention was made that the court proceeding amounted to a contract between the company and the city, and this was based upon the proposition that in the application the petitioner offered to be bound by such terms.

The court said (p. 165):

> Was there a contract made in that proceeding? Who were the parties, and were they competent to make such contract? The city did not enter into any contract. The proceeding reached the probate court because the city and the company could not agree either as to the rates or mode of use of the streets, for both of these were subjects of provision in the ordinance proposed by the company for passage by the council. We are informed by counsel for relator that the probate court acted in behalf

of the city, which was made a part of the proceeding; but that proposition seems untenable, when we reflect that the court has neither express nor implied authority to enter into any such contract, and a statute which would undertake to confer upon that court the right to enter into such contracts would be open to serious attack. * * *

Again the court said (p. 166):

> Counsel for relator urge that estoppel by adjudication applies, and that the decree of the probate court is an entirety, and must all stand or all fall.
>
> On the subject of rates, the adjudication is a mere nullity, as before stated, and it has no efficacy in law as an adjudication. Therefore, there has been no adjudication of the rates, and the record of that court upon that subject constitutes no estoppel. And we can not concur in the proposition that the balance of the order directing the mode of using the streets must also fail.

Moreover, the effect of this part of the petition, and the judgment upon it, would be to compel the Railroad Company to accept, in lieu of damages for the taking of the property, certain terms and conditions in reference to the future occupation of portions of its right of way left unidentified, unlocated, and undescribed.

This, we say, can not be done.

The *Woolfolk case* in 2 Swan, 36, is authority for the proposition that the owner can not be paid, even in incidental benefits, when property is taken, which the improvement necessarily carries to him, because, the court

says, a man's property may not be taken without compensation, and compensation is law means money.

Here we have a proposition doubtless which will be understood, in case the contention was established, that there was really no damage to the Railroad Company's property, because the Telegraph Company, in taking this property, substituted for damages its own obligations to do certain things whenever emergencies arise.

That would be equivalent to saying to the property owner when his property was sought to be condemned, "You have not any use or need for this property at the present time. We will take your property, and in case you want to ever sell it or build on it, we will either get off of it, or we will pay you a reasonable price for the damage you sustain."

Here, however, the proposition is not to get off entirely, but to move over on to another part, as at present, unknown both as to its locality or the damage that will be sustained.

Suppose this judgment were upheld and that at some future time the Railroad Company desired to have the tracks moved. It is manifest that the very first question that would be raised would be that this was an invalid or void stipulation, and not binding upon the Telegraph Company. But if this were not done, and if we accredit all good faith to the petitioner, certainly a controversy would come up as to whether there was any "reasonable necessity" for it or not; for it is impossible to believe that a court can invest either party to a condemnation

proceeding with the power, upon its own caprice, to compel the other party to do certain things.

Lewis on Eminent Domain, 2d Ed., Sec. 505, states:

> The commissioners or other tribunal to assess damages, have no authority to give compensation in anything but money. It is erroneous, therefore, for them in their award to reserve to the owner certain easements or privileges in the property condemned, such as the right to construct a way over it, or drains through it, or the right to leave buildings or parts of buildings standing thereon and use them as before. So it is erroneous for the tribunal to award that the party condemning shall do certain things for the benefit of the owner, and to secure the damages accordingly. Thus, an award that a railroad company shall build fences, and maintain crossings and cattle guards, or construct culverts and waterways, is bad.

In Sec. 135, Mills on Eminent Domain, states:

> Nothing except money can be forced on the owner of lands condemned, in payment of his damages. * * * Particular easements or conditions can not be forced on the parties against their will, in reduction of damages; and there is a very respectable showing of authorities to the effect that a payment in benefits is not a payment in money, or a just compensation to the owner. * * * A person whose land has been taken for public use is entitled to be paid in money.

We have already seen the Railroad Company, as pleaded in its answer, has power and authority under its

charter as amended to construct, maintain and operate on its right of way a telegraph or telephone line, one or both, not only in the conduct of its railroad business, but commercially as a common carrier of messages for hire. Furthermore, it is empowered and authorized by the Act of Congress approved June 23, 1879 (U. S. Comp. Stats., 1901, Sec. 5268), hereinabove cited, to transmit telegrams over its own telegraph lines, for the Government *and for the general public,* at rates to be fixed by the Government. Its right of way is, therefore, entitled to the same protection as that of any other telegraph company engaged as a common carrier of interstate messages for hire. We know of no statute, Federal or State, that provides that one such telegraph company may condemn for its use any of the right of way of another such telegraph company, as is sought to be done in this case. If the Louisiana statute (Sec. 696) is to be construed as undertaking to authorize the expropriation of the line of one telegraph company engaged in interstate commerce by another telegraph company so engaged, it would be ineffective for that purpose, because not permitted by any Act of Congress, and, furthermore, it would amount to a direct burden upon and interference with interstate commerce, in violation of the commerce clause of the Constitution of the United States, pleaded and relied on in the answer of the Railroad Company herein (R., 54).

Upon the foregoing grounds, and the authorities cited in support thereof, we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed,

with direction to that court to reverse the judgment of the District Court and dismiss the petition of the Telegraph Company, with a recovery of costs in favor of the Railroad Company.

VICTOR LEOVY,
GEORGE DENEGRE,
HENRY L. STONE,
Attorneys for Plaintiff in Error.

APPENDIX.

STATUTES OF LOUISIANA.

Telegraph Companies.

Sec. 696. Right of Way. Expropriation.

Corporations chartered or formed under the laws of this or of any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone or other system of transmitting intelligence, the equivalent thereof, which may hereafter be invented or discovered, may construct (and) maintain such telegraph, telephone or other lines necessary to transmit intelligence along all State, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; *provided,* that the ordinary use of such roads, works, railroads and waters be not thereby obstructed, and along the streets of any city, with the consent of the council or trustees thereof, and such companies shall be entitled to the right of way over all lands belonging to the State and over the lands, privileges and servitudes of other persons and corporations, and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right by con-

sent, contract or agreement upon just and reasonable terms, then such companies or corporations shall have the right to proceed to expropriate the same, as provided in and by the laws of the State relative to expropriation of lands for railroads and other works of public utility, and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this Act shall have the power to contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this Act (as amended by Act 124, 1880, p. 168).

(Wolff's Revised Laws of Louisiana, Vol. 1, pp. 236-7.)

Sec. 1479. Expropriation for Certain Purposes. Proceedings.

Whenever the State or any political corporation of same created for the purpose of exercising any portion of the governmental powers in the same, and any corporation, created by the State of Louisiana, for educational or charitable purposes, or the board of administrators or directors of any charity hospital or any board of school directors therefor, any corporation constituted under the laws of this State for the construction of rail-

roads, plank roads, turnpike roads, or canals for navigation, or for the construction, maintenance and equipment of an exposition, having the endorsement of the National Government, or for the construction or operation of waterworks or sewerage to supply the public with water and sewerage (or for the piping and marketing of natural gas for the purpose of supplying the public with natural gas), or for the purpose of transmitting intelligence by magnetic telegraph, can not agree with the owner of land which may be wanted for its purchase, it shall be lawful for such State, corporation, board of administrators, directors or persons to apply by petition to the District Court, in which the same may be situated, or if it extends into two districts, to the judge of the District Court, in which the owner resides, and if the owner does not reside in either district, to either of the District Courts, describing the land necessary for the purposes, with a plan of the same, and a statement of the improvement thereon, if any, and the name of the owner thereof, if known at present in the State, with a prayer that the land be adjudged to such State, corporation, board of administrators or directors upon payment to the owner of all such damages as he may sustain in consequence of the expropriation of said land for public works; all claims for land or damages to the owner caused by its taking or for expropriation for such public work shall be barred by two (2) years prescription which shall commence to run from the date at which the land was actually occupied and used for the construction of the works.

(Acts State of Louisiana, Session 1910, pp. 194-5.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Plaintiff in Error,*

versus

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - *Defendant in Error.*

It is hereby agreed and stipulated by and between the Louisville & Nashville Railroad Company, plaintiff in error, and the Western Union Telegraph Company, defendant in error, represented by their respective counsel, that the attached certified copy of the petition and bond for removal herein of this cause from the Civil District Court for the Parish of Orleans, Louisiana, to the United States District Court in and for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division, may be filed and used as a part of the record on the hearing of this cause in the Supreme Court of the United States.

DENEGRE, LEOVY & CHAFFE,
Counsel for Plaintiff in Error.

HOWE, FENNER, SPENCER & COCKE,
Counsel for Defendant in Error.

January 13, 1915.

PETITION, ORDER, BOND FOR REMOVAL AND THREE EXHIBITS, FILED MAY 31, 1912.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Western Union Telegraph Company *vs.* Louisville & Nashville Railroad Company	No. 100,244, Civil District Court Parish of Orleans, Louisiana Division D.

Filed May 31, 1912.

To the Honorable, the Civil District Court, in and for the Parish of Orleans, State of Louisiana.

Your petitioner, the Louisville & Nashville Railroad Company respectfully shows to the court that it is the only defendant in the above-styled suit, which is now pending in this court, which is wholly of a civil nature and of which the District Courts of the United States are given original jurisdiction by the provisions of the Act of Congress, approved March 3, 1911, entitled, "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," effective January 1, 1912, and of which the United States District Courts and the State Courts have concurrent jurisdiction; and said suit arises under the Constitution and laws of the United States.

The original petition in said suit was filed on April 12, 1912, but the only process issued and proceedings taken on said original petition were null and void and were so declared by said Civil District Court and this

petitioner filed no pleadings nor appearance to said original petition except a limited appearance by exception expressly limited to the sole purpose of having said process quashed.

The amended and supplemental petition in said suit, hereafter styled the amended petition, was filed on May 21, 1912, the process then issued (being the only process in said suit, except the null process above mentioned) being returnable on the 4th day of June, 1912, and the time for pleading or making defense to said amended petition on said original petition as amended, under the laws of Louisiana and the rules of this court, has not yet arrived; that the matter and amount in dispute in this cause exceeds the sum and value and amount of three thousand dollars exclusive of interest and costs, and exceeded said sum, balance and amount, exclusive of interest and costs at the time when the plaintiff's original petition herein was filed and ever since and now.

The plaintiff, Western Union Telegraph Company, of New York, claiming to be a corporation under the laws of the State of New York, in its complaint as amended expressly seeks to condemn a certain right of way over defendant's property therein described as and in fact situated in Orleans and St. Tammany Parishes, State of Louisiana, and on and over navigable waters of the United States within said Parishes, which property is within the jurisdiction of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division; and plaintiff expressly seeks to subject said property to its use under the power of eminent domain, invoking the laws of the United States and of the State of

Louisiana, to enable it to obtain and continue the maintenance and operation of its line over and across defendant's said property which is the asserted purpose of its proceeding herein.

The petition as amended shows on its face that this is a local action in which the plaintiff, Western Union Telegraph Company of New York, seeks to enforce a claim in and upon real estate situated in said Parishes of Orleans and St. Tammany, which are within the New Orleans Division of the Eastern District of Louisiana, the owner of said property, defendant herein, being a non-resident of the State of Louisiana, but a corporation and citizen and resident of Kentucky.

The plaintiff, the said Western Union Telegraph Company, expressly avers in its amended petition as follows:

> "That the plaintiff has duly and formally accepted the provisions of the Act of Congress entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes' approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby."

That the plaintiff, the said Western Union Telegraph Company, alleges in its original petition that petitioner is engaged in and is carrying on the business of a common carrier by railroad of passengers and freight through various States and in and through the State of Louisiana, and more particularly in and through the Parishes of Orleans and St. Tammany in said State; and said original petition describes a strip of ground or right

of way averred therein to belong to this petitioner and to be situated in said two Parishes; and said original petition avers that on said strip of ground this petitioner has constructed and operates a railroad and necessary appurtenances, and that where the line of said railroad crosses navigable streams or bodies of water bridges have been constructed, notably where said railroad crosses the streams known as the "Little Rigolets" and "Rigolets."

This petitioner avers that said petition accordingly shows on its face that said Western Union Telegraph Company is an agency of the Federal Government and that said Government has property rights therein, under the provisions of the Act of Congress referred to; and that this petitioner's right of way is a highway of interstate commerce and a post-road (under the statutes of the United States), thus constituting it also an agency of the Federal Government.

The said Western Union Telegraph Company in its said original petition expressly prays that after proceedings, consisting of notice to jurors and the impaneling of a jury to fix and assess the value of the right sought to be expropriated and to determine the damage to be inflicted thereby, that judgment be rendered expropriating in its favor and against this petitioner the right of use for a telegraph line as described in said petition over the right of way, bridges and property of this petitioner in the form, to the extent, and within the limitations and conditions as described in said petition, being merely subsidiary to and leaving untouched the substantial prayer for the expropriation of said use over said land

and bridges within said two Parishes as aforesaid; and said prayer is reiterated in said amended petition.

The said Western Union Telegraph Company in said petition as amended thus claims a right in and to this petitioner's highway of commerce or post-roads and seeks to take from this petitioner and appropriate to its own use, under and by virtue of the said Act of Congress of the United States of America, the said property right of this petitioner, which proceeding is a suit at law of a civil nature arising under the Constitution and laws of the United States within the meaning of the second section of the Act of Congress of March 3, 1875 (18 Stat. at L., 470, ch. 137), as amended by the Acts of Congress of March 3, 1887 (24 Stat. at L., 552, Chap. 373), and August 13, 1888 (25 Stat. at L., 433, Chap. 866), and as reclassified and continued in the Judiciary Act approved March 3, 1911, and effective January 1, 1912, Chap. 2, Sec. 24, and Chap. 3, Sec. 28; that the defendant's right of way was made a highway of Interstate Commerce by Act of Congress of June 15, 1866, and a post-road by Act of Congress of 1838 and 1872; and that in addition to being thus constituted a highway of Interstate Commerce for the carriage of freight and passengers, the defendant, Louisville & Nashville Railroad Company, has also become a telegraph company by amendment to its charter under the Constitution and laws of Kentucky, and by virtue of its acceptance, which it has made in writing, of the obligations and restrictions of the Act of Congress of July 24, 1866, with all the rights, privileges and immunities contained therein; and that by virtue of the Act of Congress of June 23, 1869, Chapter 35 (21

Stat. at L. 31), it is authorized to transmit intelligence not only for its railroad purposes, but for the United States Government and for the general public, and that while plaintiff claims and asserts certain rights against the property of defendant, under the Constitution and laws of the United States, this defendant also claims certain rights, privileges and immunities under the same provisions of the Constitution, and under the same laws, of the United States.

Petitioner shows that there is involved in this suit a controversy arising under the Constitution and laws of the United States, in that the plaintiff, Western Union Telegraph Company, is seeking to condemn under the State laws and under the Acts of Congress, an easement for maintaining and operating its telegraph lines upon and along the said right of way of the defendant which necessarily involves the construction of Clause 3, Section 8 of Article 1 of the Constitution of the United States, which confers upon Congress the exclusive right to regulate commerce among the several States; and also involves the construction of Acts of Congress passed in pursuance of the Commerce Clause of the Constitution, to which laws the plaintiff's complaint as amended shows defendant is subject, and under the averments of the complaint as amended this controversy would especially involve and its result would be dependent upon the construction of the Acts of Congress of June 15, 1866, providing that every Railroad Company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon its road, boats, bridges and ferries, all passengers, troops, govern-

most supplies, mails, freight and property on their way from any State to another, and to receive compensation and to connect with lines in all other States, so as to form continuous lines for the transportation of same to the place of destination; that the amended petition in this proceeding, construed in the light of its averments, also involves the construction of the Act of Congress of July 24, 1866, relating to telegraphs, the provisions of which the plaintiff avers in its amended complaint it has accepted and under which it asserts certain rights; and to meet its requirements and restrictions certain alleged "offers and counter" are made in the original complaint, so that the correct decision of this controversy will depend upon the construction of said Acts of Congress; that the correct decision of this controversy will also depend upon the construction of the post-road Acts of Congress, to the provisions of which the plaintiff, in its complaint, shows that the defendant railroad company's highway is subject; that the exercise of the right by the plaintiff in its complaint to enforce any portion of defendant's highway of interstate commerce, either under the Statutes of the United States or under the laws of Louisiana, involves not only the construction of the Commerce Clause of the Constitution of the United States, but also of the various Acts of Congress passed in pursuance thereof, and with respect to post-roads, and involves a construction of the effect of the Act of Congress of July 24, 1866, upon the right of the plaintiff to proceed under State authority and the effect of one act upon the other, and the construction of the Acts of Con-

gress, when asserted by the plaintiff, jointly with the Louisiana statute, upon the correct decision of which will depend the rights of the parties in and to this suit.

Petitioner desires to remove this suit before the trial thereof into the next District Court of the United States to be held in and for the Eastern District of Louisiana, at New Orleans, and tenders herewith a bond, with good and solvent surety, for its entering into said District Court of the United States within the time required by law, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

WHEREFORE, petitioner prays that the said bond and surety may be approved and accepted; that this Honorable Court proceed no further herein, except to make the order to removal and cause the record to be certified and removed to said District Court of the United States; that this suit may be removed into the next District Court of the United States to be held in the Eastern District of Louisiana, pursuant to the statutes of the United States in such cases made and provided.

The appearance in this case is special and for the purpose of this removal only.

(Signed) LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner,*
By CHAS. MARSHALL,
Agent and Attorney.
By GEO. DENEGRE,
Agent and Attorney.

AFFIDAVIT.

State of Louisiana, }
Parish of Orleans. }

Comes Charles Marshall, and makes oath and says that he is agent and attorney for the defendant, petitioner herein, and that the foregoing petition is true of his own knowledge, except as to matters stated therein on information and belief, and as to these, he believes it to be true; and that the President, Vice-President, and other general officers of said defendant are absent from Louisiana.

(Signed) CHAS. MARSHALL.

Sworn to and subscribed before me on this, the 28th day of May, 1912.

(Signed) FELIX J. PUIG,
(Seal) *Notary Public.*

AFFIDAVIT.

State of Louisiana,
Parish of Orleans, La.

Comes Charles Marshall and makes oath and says that he is agent and attorney for the defendant petitioner herein, and that the foregoing petition is true of his own knowledge, except as to matters stated therein as to information and belief and as to these he believes to be true, and that the President, Vice-presidents and other general officers of said defendant are absent from Louisiana.

(Signed) CHAS. MARSHALL.

Sworn to and subscribed before me this 31st day of May, 1912.

(Signed) FELIX J. PUIG,
Notary Public.

CIVIL DISTRICT COURT,

Parish of Orleans, Louisiana.

State of Louisiana, }
Parish of Orleans. } ss:

WESTERN UNION TELEGRAPH COMPANY, - - *Plaintiff,*

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Defendant.*

Bond of defendant, Louisville & Nashville Railroad Company, for removal of cause to the District Court of the United States for the Eastern District of Louisiana.

Know all Men by these Presents:

That the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, as principal, and Felix J. Puig, of New Orleans, State of Louisiana, as surety, are holden and stand firmly bound unto the Western Union Telegraph Company, a corporation of the State of New York, the plaintiff in the above-entitled cause, its successors and assigns, in the penal sum of Five Hundred ($500.00) Dollars, for the payment whereof well and truly to be made unto the said plaintiff, its successors and assigns, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Upon condition, nevertheless, that whereas the said Louisville & Nashville Railroad Company, defendant in the above-styled cause, has filed its petition in the Civil District Court, for the Parish of Orleans, State of Louisiana, for the removal of a certain cause therein pending, wherein the said Western Union Telegraph Company is plaintiff and the said Louisville & Nashville Railroad Company is defendant, to the District Court of the United States in and for the Eastern District of Louisiana.

Now, if the said Louisville & Nashville Railroad Company shall enter into the said District Court of the United States within thirty days from the filing of said petition for removal as aforesaid a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF the said Louisville & Nashville Railroad Company has caused these presents to be signed by Charles Marshall, its attorney in fact and at law, and the said Felix J. Puig has hereunto set his signature, this the 28th day of May, A. D. 1912.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By Chas. Marshall.
(Signed) Felix J. Puig,
Surety.

State of Louisiana,
Parish of Orleans. } ss:

Felix J. Puig, the surety named in the foregoing bond, being first duly sworn, deposes and says:

That he is a resident and householder of said Parish and State; that he is the same person whose name is signed to the foregoing bond; and that he is the owner of real estate situated in the Parish and State aforesaid of the value of more than Five Hundred ($500.00) Dollars, named as the penalty therein and is worth said sum, over and above all his just debts and liabilities, exclusive of property which is exempt from execution.

(Signed) Felix J. Puig.

Subscribed and sworn to by said Felix J. Puig, before me, Edgar Grima, a Notary Public in and for the Parish and State aforesaid, fully authorized and empowered by the laws of said State to administer oaths, as witnesses my hand and official seal hereto affixed this 28th day of May, A. D. 1912.

(Signed) Edgar Grima,
(Seal) *Notary Public, Parish of Orleans, State of Louisiana.*

State of Louisiana,
Parish of Orleans. } ss:

Victor Leovy, one of the attorneys of the petitioner, being duly sworn, deposes and says that written notice

of the foregoing petition and bond for removal was given to the plaintiff's attorney of record, Mr. Bernard J. Meyer, prior to filing the same, to-wit, on the 28th day of May, 1912, the original of said notice being attached hereto as part hereof, marked N. this May 28, 1912.

(Signed) VICTOR LEOVY,
Attorney for Petitioner.

Sworn to and subscribed before me, at New Orleans, Louisiana, on this 28th day of May, 1912.

(Signed) FELIX J. PUIG,
(Seal) *Notary Public.*

Western Union Telegraph Company, *vs.* Louisville & Nashville Railroad Company.	No. 100,244 Civil District Court Parish of Orleans, La., Division "D."

To the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, plaintiff in above suit, through Messrs. Howe, Fenner, Spencer and Cocke and B. J. Mayer, its attorneys of record herein:

Please take notice that on Friday, May 31, 1912, at eleven o'clock a. m., the Louisville & Nashville Railroad Company will file in the Civil District Court for the Parish of Orleans, the petition for removal, annexed affidavit, bond and annexed affidavit, and proposed order, of all of which papers copies are handed you herewith;

and will file at the same time a copy of this notice with affidavit as to service.

May 28, 1912.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Louisville & Nashville Railroad Company.

Victor Leovy, being duly sworn, deposes and says: That on Tuesday, May 28, 1912, at 3:25 p. m., he served notice, of which foregoing is a true copy, together with true copies of the documents therein described, upon Mr. Bernard J. Meyer, one of the said attorneys for said Western Union Telegraph Company, in the office of said attorneys in New Orleans, Louisiana, by handing said notice and copies to said Mr. Bernard J. Meyer in person.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, La., this 28th day of May, 1912.

(Signed) FELIX J. PUIG,
(Seal) *Notary Public.*

Western Union Telegraph Company, *vs.* Louisville & Nashville Railroad Company.	No. 100,244 Civil District Court Parish of Orleans, La., Division "D."

To the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, plaintiff in above suit, through Messrs. Howe, Fenner, Spencer and Cocke and B. J. Mayer, its attorneys of record herein:

Please take notice that before the filing of the petition for removal of which copy was handed you, it will be amended by adding on the fifth line from the top of page two (2), after the words "interest and costs" the words "and exceeded said sum, value and amount, exclusive of interest and costs at the time when the plaintiff's original petition herein was filed and ever since and now":

As so amended said petition will then be reverified and filed.

(Signed) DENEGRE & BLAIR,
(Signed) VICTOR LEOVY,
Attorneys for Louisville & Nashville Railroad Company.

Victor Leovy, being duly sworn, deposes and says that he served the original notice of which the foregoing is a copy on Mr. Chas. P. Fenner, one of the attorneys of record for the above-named Western Union Telegraph Company by handing said original notice to the said Mr. Chas. P. Fenner in his office at New Orleans, Louisiana, at 9:30 a. m. on this, the 31st day of May, A. D. 1912.

(Signed) VICTOR LEOVY.

Sworn to and subscribed before me at New Orleans, Louisiana, this 31st day of May, A. D. 1912.

(Signed) FELIX J. PUIG,

(Seal) *Notary Public.*

ORDER OF REMOVAL.

Western Union Telegraph Company, *vs.* Louisville & Nashville Railroad Company.	No. 100,244 Civil District Court Parish of Orleans, La.

The defendant herein having within the time provided by law filed its petition for removal in this cause to the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and having at the same time offered its bond in the sum of Five Hundred Dollars, with Felix J. Puig good and sufficient surety, pursuant to the Statutes and conditioned according to law; now, therefore, this court does hereby accept and approve said bond and accept said petition, and it is ordered that this cause be removed for trial to the next District Court of the United States for the Eastern District of Louisiana, New Orleans Division, pursuant to the statutes of the United States, and that all other proceedings in this court be stayed.

The order for removal in this case is refused.

N. O., June 4, 1912.

(Signed) PORTER PARKER,
Judge.

UNITED STATES OF AMERICA, DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA.

CLERK'S OFFICE:

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify the above and foregoing to be a true extract from the Transcript of Removal from the Civil District Court for the Parish of Orleans, in the matter entitled "Western Union Telegraph Company vs. Louisville & Nashville Railroad Company," No. 14,528 of the docket of this court, on file in this office.

Witness my hand and the seal of the said court, at the city of New Orleans, Louisiana, this 14th day of January, A. D. 1915.

(Seal)

H. J. CARTER,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 183.

Louisville and Nashville Railroad Company, Plaintiff in Error,

vs.

Western Union Telegraph Company, Defendant in Error.

REPLY BRIEF ON BEHALF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR.

In view of the elaborate argument already filed, this brief will be substantially confined to a reply to that filed by the Western Union Telegraph Company, and will follow the plan of presentation adopted in the latter.

I. WESTERN UNION HAD NO AUTHORITY TO OWN AND OPERATE A LINE OF TELEGRAPH IN THE STATE OF LOUISIANA.

Under this head we will consider:—

(*a.*) By the law of the State of its creation—New York—Western Union was not authorized;

(*b.*) Nor by the Act of Congress of 1866, nor by any other Act of Congress, was it so authorized.

(*c.*) A prerequisite condition to the exercise, under the law of the State of Louisiana, of the power to expropriate, was ignored in the lower Court.

(*d.*) Neither by the law of Louisiana, nor by any Act of Congress, was authority given to one telegraph company, to expropriate property needed for the purposes of another telegpraph company.

(a.) *By the law of the State of its creation—New York—Western Union was not authorized.*

Western Union practically concedes, what it must concede, *i. e.*, that authority must have been granted to it by the State creating it, to enable it to construct and operate its telegraph. It does not contend that the mere grant of the right to exercise eminent domain, conferred by another State, will be sufficient, if the exercise to it of such power, be not conferred by the State of incorporation.

This concession is made, inferentially, by our adversaries, when they contend that "it is not true that under its charter "and the law of the State of New York, under which it is "incorporated, the Western Union Telegraph Company was, "at the time this suit was instituted, prohibited in express "terms or by implication from operating in Louisiana."

Water Works *vs.* Farmers' L. & T. Co., 20 Colo., 209;

Canada Southern Ry. Co. *vs.* Gebhart, 109 U. S., 529;

Bank of Augusta *vs.* Earle, 13 Peters, 585; and

Thompson on Corporations, 2nd Ed., Vol. 5, Sec. 6627.

See also Central Trans. Co. *vs.* Pullman Palace Car Co., 139, U. S., 24;

Pittsburgh, etc., R. Co. *vs.* Keokuk, etc., Bridge Co., 131 U. S., 371;

St. Louis, etc., R. Co. *vs.* Terre Haute, etc., R. Co., 145 U. S., 393;

Jacksonville, etc., R. & Nav. Co. *vs.* Hooper, 160 U. S., 514;

California Bank *vs.* Kennedy, 167 U. S., 362;
Concord First Nat. Bank *vs.* Hawkins, 174 U. S., 364;
Louisville, etc., R. Co. *vs.* Louisville Trust Co., 174 U. S., 552;
Rolfe *vs.* Rundle, 103 U. S., *222*; and
Railroad *vs.* Koontz, 104 U. S., 5.

As a corporation can incur no liability, in a matter in which it is not authorized to act, by the State of its incorporation, it could not be compelled to make compensation for property appropriated by it *ultra vires*.

It is conceded by our adversaries that the Western Union had no power, under its original incorporation, to operate in the State of Louisiana. It claims to exercise it, however, by virtue of Section 1 of the Act of April 22d, 1862, and says:—

> "4. It was authorized to construct, own, use and "maintain any line or lines of electric telegraph not "described in their original certificate of organization, "whether wholly within or wholly or partly beyond the "limits of the State of New York, and this section re-"quired no action whatever upon the part of the com-"pany as a condition precedent to the exercise of the "said right. The words in said section 'upon the terms "'and conditions, and subject to the liabilities pre-"'scribed in the said Act' manifestly import simply "that as to such additional lines as said company might "construct under the permission granted by the said "section, the company should be bound by the various "provisions of the original Act of 1848, regulating "the duties and liabilities of the companies organized "thereunder."

The Western Union was incorporated under the Act of 1848, which was amended by the Act of April 8th, 1851; by that of April 12th, 1853; and by that of April 12th, 1862.

None of these Acts, saving that of 1848, were original enactments. They were amendatory of the Act of 1848. That Act, as originally enacted, must be read as it now stands amended.

No provision of the Act of 1848, or of subsequent amendments, was repealed by any later amendments. The only effect of these was, to alter, so far as the amendment made alterations, what had been originally directed.

The Act of 1862, therefore, upon which the appellee relies, must be read into the Act of 1848, as a part thereof as it stood amended. All provisions not modified prior to the last amendment, remain in full force.

As is stated in Black on Interpretation of Law, Sec. 131:

> "An amendment of a statute by a subsequent Act "operates precisely as if the subject matter of the "amendment had been incorporated in the prior Act at "the time of its adoption, so far as regards any action "had after the amendment is made."

As is said in Lewis' Sutherland Statutory Construction, 2nd Ed., page 444:—

> "It is a general rule, however, that an amended "statute is constructed as regards any action had after "the amendment was made, as if the statute had been "originally enacted in the amended form. The effect "of an amendment of a section of the law is not to "sever it from its relation to other sections of the "law, but it is to give it operation in its new form, as "if it had been so drawn originally, treating the whole "Act as a harmonious entirety, with its several sec- "tions and parts mutually acting upon each other."

Again, as is said in Black on Interpretation of Law, Sec. 130:—

> "When an amendment to a statute is adopted there "are not two separate enactments, the old and the new, "but by their union there is produced one law, viz.; "the statute as amended. From this it follows that "the legislative intention in making the amendment "is to be learned from a consideration of the original "Act, and the amendment as one Act. And conse- "quently, on the principle that the interpretation is to

"be such, if possible, as to give effect to every clause "and provision of every statute no portion of either "the original Act or the amendment should be de- "clared inoperative if it can be sustained by any "rational construction, and without putting upon the "language employed a forced or unnatural meaning. "For the same reason, of two constructions, either of "which is waranted by the words of an amendatory "Act, that is to be preferred which best harmonizes "the amendment with the general tenor and spirit of "the Act amended."

The Act of April 8th, 1851, (Appellee's Brief, page 33), gives to the directors and trustees of a telegraph company, incorporated under the Act of April 12th, 1848, "at any "time, with a written consent of the persons owning two- "thirds of the capital stock of such company," power to "extend their line of telegraph, or to construct branch lines "to connect with their main lines, &c."

This, being an amendment to the Act of 1848, is, therefore, a part and parcel thereof.

Any powers given to the directors or trustees of a telegraph company by any subsequent statute, must be accepted with the restriction that the consent of the stockholders to such extension shall be given.

There is no suggestion in the Act of April 22d, 1862, that this consent is not required. The subject is not dealt with. The power is conferred upon the telegraph company to extend its lines, &c., but this power is subjected to "the "terms and conditions and liabilities in the matter of con- "structing, leasing, owning, using or maintaining said lines, "prescribed in the Act of 1848, so far as such provisions are "applicable to the construction, using, maintaining, &c., of "such lines."

Our adversaries suggest, without attempting to demonstrate, that the subjection did not include, as a condition precedent to the right of the corporation to construct the additional lines, a compliance with the affirmative conditions precedent prescribed in the Act of 1848 as amended.

Their suggestion is, that Section 2 of the Act of 1862 provides for filing a certificate describing the general route of such extended line or lines, and that, therefore, the provision requiring consent of two-thirds of the stockholders, is unnecessary.

The filing of the certificate, however, is only one of the things required to be done by the telegraph company. Nothing is said, in the second section, by way of release of the obligation to obtain the consent of the stockholders to the action of directors.

It is difficult to understand, why, or how, the condition of the Act of 1848 as amended; requiring such consent, is not one of the terms, conditions and liabilities prescribed by the Act in the matter of constructing, using, maintaining, owning or holding extended lines.

There is no suggestion, in any part of the record, that the consent of the stockholders, as required by the amended Act of 1848, was ever given, and, without such consent, the corporation could not exercise the power.

Not only was the legislative power coupled with the necessity of obtaining this consent, but the corporation itself, in its Articles of Incorporation (Record, 167), provided:—

> "Art. 24. Whenever the board of directors, by a "vote of the majority of all the members thereof, shall "determine that it is for the interests of the company to "extend its business by adding to the number of wires "or conductors upon the lines aforesaid, or by con- "structing any other line or lines to operate in connec- "tion therewith, &c., they shall enter their determina- "tion upon their minutes at large; and all such addi- "tions shall be made by an increase of the capital stock, "and in no other manner."

(Here follow directions as to the manner of calling a stockholders' meeting to approve or disapprove.)

The Article concludes:—

> "If at such meeting the persons owning two-thirds "of the stock shall vote in favor of such increase, &c.,

"the directors shall be authorized to increase the stock "accordingly."

(b.) *Nor by the Act of Congress of 1866, nor by any other Act of Congress, was the Western Union authorized to construct or operate in Louisiana.*

The Act of Congress conferred no franchise upon the Telegraph Company to enter upon railroads, either with, or without, the consent of the companies owning the same. Its provisions assumed the existence of power in the Telegraph Company to do what it permitted, *i. e.*, to enter upon post roads, and upon railroads where the owners assented to such entry.

Not only did the Act of 1866 confer no power to occupy any portion of the Railroad property under the right of eminent domain; but it professed to confer no power upon a corporation which it was not authorized to exercise under powers granted by the State to which it owed its corporate existence.

In the Pensacola case, 96 U. S., 11, speaking of the Act of 1866, it is said:—

> "It gives no foreign corporation the right to enter "upon private property without the consent of the "owner and erecting the necessary structures for its "business; but it does provide that whenever the con- "sent of the owner is obtained, no State legislation "shall prevent the occupation of post roads for tele- "graph purposes by such corporations as are willing "to avail themselves of its privileges."

This Court, in Western Union Telegraph Company *vs.* Attorney General, 125 U. S., 530, said:—

> "The telegraph company, which is the defendant "here, derived its franchise to be a corporation and "to exercise the function of the telegraphing from the "State of New York. It owes its existence, its capac- "ity to contract, its right to sue and to be sued and to "exercise the business of telegraphy to the laws of "the State under which it is organized. But the privi-

"lege of running its lines or wires 'through and
" 'over any portion of the public domain of the United
" 'States,' &c., is granted to it by the Act of Congress.
"This, however, is merely a permissive statute."

In Western Union Telegraph Company *vs.* Gottlieb, 190 U. S., 421, it was held that a taxation upon franchises owned by the telegraph company "did not and could not "have included therein any franchises derived by the de-"fendant from the Government of the United States, be-"cause the government had conferred no such franchise."

(c.) *A prerequisite condition to the exercise, under the law of the State of Louisiana, of the power to expropriate was ignored in the lower Court.*

The Louisiana Expropriation statute (Plaintiff in Error's Brief, page 153), confers the right only under the express proviso:—

"That the ordinary use of such roads, works, rail-"roads and waters be not thereby obstructed."

The question of obstruction was at issue, under the pleadings.

It was expressly averred in the answer of the Louisville & Nashville (Record, page 53):—

"Defendant avers that the construction of the line "of poles and wires as proposed will seriously interfere "with and hamper the ordinary use of property in each "of the several above respects, as shown by experience. "* * * The interference would be serious, and, in-"deed, in time, destructive, and the interference with "defendant's telegraph business, and espcially with the "business along the route it has selected, would be "destructive from the beginning; all contrary to acts "of Congress of June 15th, 1866, July 24th, 1866, and "Article I, Section 8, paragraphs 3 and 7, of the Con-"stitution of the United States, and the Louisana Act "140 of 1880."

A considerable amount of testimony was offered by the plaintiff in error, which was not seriously controverted by the defendant in error, to the effect that the taking of its right-of-way as proposed, would seriously hamper and interfere with its construction of a line of telegraph and telephone poles and wires necessary for the operation of the railroad; that delays would necessarily result in consequence of needed reparation, from time to time, of its lines; that it would be subjected to danger from fires; that its use of its bridges over navigable streams would be injuriously affected; that the bridges themselves would be exposed to undue danger; and that its right-of-way would be required for its future operations.

It is true that the defendant in error argues that the railroad company has no right to be considered, in the matter of its future necessities; and that all to which attention can be demanded, is present needs.

We submit that this view is entirely inadequate. Every railroad company acquires a right-of-way, larger in width than what may be immediately required, because its inevitable growth and increasing public demands will necessitate the laying down of additional tracks, and the occupation, more and more, of a greater width of way.

To permit a telegraph company, permanently, to take a portion of a right of way not in immediate use, although likely to come into such use, would be to defeat the very purpose of the taking.

Presumably, no greater amount of right-of-way is taken than is needed, because the taking entails expense. If future needs are not to be considered, the railroad company would be forced, even if it be practical to do so, to acquire additional width of way.

The right to take being upon the condition that there should be no obstruction, and the issue of fact as to the obstruction, having been raised, supported on the part of the plaintiff in error by testimony, the taking could only be complete, and, of course, damages could only be awarded, if no obstruction was entailed.

The learned Judge charged the jury that they must not take into consideration, the question of whether or not the railroad would be obstructed in its operation; but that the sole question to be considered was, the amount of damages to be awarded.

If, therefore, the present judgment be affirmed, we have a final judgment in favor of a taking, which was only conditionally granted, without any determination as to whether the condition did or did not exist.

(d.) *Neither by the law of Louisiana, nor by any Act of Congress, was authority given to one telegraph company to expropriate property needed for the purposes of another telegraph company.*

The testimony showed how great an interference with the railroad's use would, necessarily, be entailed, by the occupancy of the Telegraph Company. (Record, page 79.) The poles must be guyed about two-thirds of the distance of the height of the pole above the ground—say sixteen feet on each side of the pole. The guys are sometimes braced by another pole, and sometimes by anchors with a storm string.

The arms (Record, page 87) on which the wires are placed project a distance of from six to ten feet.

It appeared by the testimony that the Railroad Company had appropriated the site desired to be taken by the Telegraph Company for its own use for telegraphic and telephonic purposes, in operating its line, and also for the general commercial use which it was authorized to make.

At the time of the trial, therefore, the right which was sought to be expropriated was exercised upon a site not only in use for a railroad right-of-way, but upon a right-of-way which had been appropriated for telegraphic purposes.

The Expropriation Statute of Louisiana confers no right upon one telegraph company to enter upon property appropriated for other telegraphic uses.

II. THE RAILROAD COMPANY WAS ENTITLED TO A PREFERENTIAL RIGHT TO THE SITE FOR TELEGRAPH PURPOSES, AND THE TELEGRAPH COMPANY HAD NO PREFERENTIAL RIGHT THERETO.

The first agreement entered into between the litigants bore date the 31st of May, 1876. Since that time, under contract, the Telegraph Company has occupied, with its poles and wires, a portion of the right of way.

The last agreement was entered into on the 18th of June 1884, for a term of twenty-five years from the first day of July, 1884, and, thereafter, until the expiration of one year after written notice should have been given by one of the parties to the other, of a desire, or intention, to terminate the same.

Under this agreement, the Railroad Company was to furnish free transportation to the employees of the Telegraph Company in and about the care and management of the poles and wires on its right of way, and was to transport materials, etc., free of charge.

The Telegraph Company was to construct a line of telegraph, with instruments, etc., with use of batteries for successful operation of the wires, and was to furnish telegraph facilities by wires strung upon the poles and otherwise, to the Railroad Company in and about its business, in the manner therein provided.

The site of the poles and wires which were thus to accomplish the telegraphic business of the Railroad Company as well as of the Telegraph Company, was selected, at a point which would be convenient for both, and lines and wires in use for railroad purposes were strung along the poles thus erected.

The necessary business of telegraphing and telephoning, incidental to the operation of the Railroad Company, was thus accomplished by the use of the poles and wires, which, otherwise, it would have been obliged to construct.

The termination of this agreement was not at the instance of the Railroad Company, but at that of the Telegraph

Company, which (Record, page 67), on the 11th of August, 1911, notified the Railroad Company that upon the expiration of one year from the date of delivery of said notice it would terminate its [illegible] agreement.

What took place in the present case was not the result of any necessity imposed upon the Telegraph Company, but because of its own desire to better itself by appropriating permanently, to the exclusion of the Railroad Company, at a little cost, what it had acquired as a licensee, by contract.

The difference to the Railroad Company in having as its right of way a corporation permanently given possession thereof, authorized to conduct thereon its business without any control by, or benefit to it, or in being left in control of its right of way without interference with its power to do, from time to time, what, in its judgment, would be necessary for its successful operation, was very great.

What was sought by the Telegraph Company, and conferred by the Circuit Court, was a monopoly, forever, of the right to operate a telegraph or telephone on the railroad right of way, because there would be no ability thereafter to accord a rival corporation needful space.

The Telegraph Company declined to resolve by offering, in that spirit of liberality heretofore shown by it in many of the many cases in which it has made its not meagre contribution to the exactions upon the time of this Court, so full compensation for its permanent occupation, *five dollars per mile*, or about one hundred and seventy-five dollars in all.

It sought to expropriate to itself, that part of the right of way which was best adapted for use for telegraph purposes, inasmuch as the right of way having been originally located upon a marsh, to utilize the other side thereof, would require a large expenditure.

It does not appear that there was ever any resolution by the board of directors, or by the stockholders, of the Telegraph Company, appropriating the site. The communication as to its intentions came only from one, two or more of its officers.

[redacted]

"graph of messages necessary in the conduct of its busi-
"ness of running trains and transporting persons and
"freight, and is now using the same for the said pur-
"pose."

Also (Record, pages 55-56):—

"That under the said contract and the provisions
"thereof the petitioner and the defendant selected the
"point at which the poles should be placed for the put-
"ting thereon of cross-arms and the stringing of wires,
"for the joint use of the petitioner and the defendant;
"and that in such selection the defendant chose the best,
"most convenient, least expensive and most proper place
"for the erection, maintenance and operation of a tele-
"graph line for its own business, and if the petitioner
"be allowed to condemn the said location and appro-
"priate the same for its own exclusive use, then the
"defendant will be deprived, not only of a portion of
"its right of way, but also of that portion which is
"best, most convenient, most practicable and least ex-
"pensive in the construction, maintenance and opera-
"tion of its own line of telegraph; and defendant is
"advised and believes that such condemnation cannot
"be had under or by virtue of the acts of Congress or
"by statute of the State of Louisiana; that the petitioner
"in its petition has located the lands as to be condemned
"for its purposes the land now occupied by the poles,
"cross-arms and other instrumentalities of the peti-
"tioner; and the said location is one which has been
"appropriated by the defendant for its telegraph lines,
"and that the condemnation by the petitioner would
"interfere with the ordinary travel and use of the rail-
"road of the defendant, and no condemnation can be
"had of any part of the said right of way under the
"said petition, since no other location but that now
"occupied by the said line of telegraph is described or
"sought in the said petition."

These averments of the answer pertain to the location originally selected by both parties to the contract of June 18th, 1884 for the telegraph line maintained and operated

thereunder for their joint use until its termination. (See Contract, Record, pages 31-46.)

It is, however, still further alleged in the answer, with respect to the location selected by the Railroad Company for its telegraph and telephone line, after the delivery on August 17th, 1911, of the Telegraph Company's notice to terminate the then existing contract and after the amendment of the charter of the Railroad Company in November, 1911, as follows (Record, pages 56-57):—

> "And defendant avers that not only has it the present "right to string its wires upon the poles erected by the "petitioner under the contract aforesaid, and to use the "said wires in its railroad business, but it also avers that "it has procured an amendment to its charter of which "copy is herewith filed as part hereof by which it is "authorized to contract, maintain and operate a tele-"graph line for the use of the public, and thus to be a "common carrier of telegraphic messages, and has filed "with the Postmaster General of the United States its "acceptance of all the 'restrictions and obligations of "'the Act of Congress, approved July 24th, 1866, en-"'titled an Act to aid in the construction of telegraph "'lines and to secure to the Government the use of "'the same for postal, military, and other purposes,' "all of which is shown by copies filed herewith as part "hereof; and that in pursuance of the said amendment "defendant has caused to be located the lines for the "purpose of telegraphic transmission of messages, both "relating to its own business and those sent for the "public for hire, at the identical place and line now "occupied by the poles erected by the petitioner and "heretofore and now used jointly by the petitioner and "the defendant; and defendant alleges that the said line "of location has been made not only in what it is advised "is a due exercise of its legal right, but in the exercise "of due prudence, care and proper economic considera-"tion, it being, as aforesaid, the best place upon the "said right of way for the construction, maintenance "and operation of a telegraph line; and defendant is "advised and believes, and therefore avers, that there is "no authority under the statutes of the United States,

"or the statute of the State of Louisiana, for one "public telegraph company, being a common carrier of "telegraphic tolls, for the public, to condemn the prop- "erty or the line, or any of the instrumentalities of "another telegraph carrier, common carrier of tele- "graphic messages, and, therefore, that the petitioner "has no right to condemn the said location sought for "in the said petition.

"Defendant avers that it is advised and believes "that the petition of the petitioner seeks to condemn a "right of way for its poles at each and every point "where its poles are now located along the right of "way of the defendant; and the defendant avers that if "the said condemnation should be had, and the peti- "tioner placed in exclusive appropriation of said space, "it the defendant, in the carrying on of its business as "a railroad for the transportation of telegraphic mes- "sages will be compelled to construct, maintain and "operate an independent telegraph line between its "stations, for the purpose of conveying telegraphic "messages necessary in the operation of its trains and "otherwise, and it avers, that at various places along "the line of its railroad, by virtue of natural and arti- "ficial conditions, it would be impossible for defend- "ant to construct its own line on its own right of way, "and the result, therefore, of the condemnation as "sought for by the petition would be that the peti- "tioner would be allowed to monopolize the right of "way of the defendant, and the defendant would be re- "quired to construct in considerable part of its own line "off its own right of way; and defendant is advised "and believes that such a result must necessarily ob- "tain, and that such a result is not legal under the stat- "utes invoked by the petitioner."

The Telegraph Company (Brief, page 18), in discussing the claim of the Railroad Company to a preferential right to a location on its right of way, after referring to certain exceptions to its petition and to the Court's order overruling the same, on August 1st, 1912, says: —

"Thereupon the defendant, filed its answer, in which, "among other numerous defenses, there was set up,

"for the first time, the defense now insisted upon here, "that the defendant desired to use and was entitled by "preference to use for telegraph purposes the particu- "lar route along its right of way which was sought to "be expropriated by the plaintiff, and in support of "this defense there was adduced evidence to the effect "that after the institution of the present suit, one of "the defendant's engineers, acting under instructions "received from some undisclosed officer or representa- "tive of the defendant company, had proceeded to "locate for the defendant the route of a proposed tele- "graph line on its right of way between New Orleans "and Pearl River, and had located for this purpose the "exact route which had been occupied for years by the "defendant (in error), and which the defendant (in "error), was seeking to expropriate in this suit."

It gives no information as to when, or how, the Railroad Company should, or could, have set up this claim, before filing its answer. Certainly that was the appropriate time, and then was afforded the first opportunity.

It is stated that the Railroad Company's selection of this location, for its own telegraph and telephone lines, was made *after* the institution of this suit. If the question of priority in this respect was important or controlling, which we deny, the Telegraph Company's operation would not be found to be barred, by aught in the Record. That suit was not "instituted" until the Judge of the Court had made a valid and proper order upon the petition filed, and the clerk in pursuance thereof had issued a valid notice or process according to law, to the Railroad Company to answer the petition of the Telegraph Company, stating the object thereof. The record shows this was not done. On the contrary, the notice first issued by the clerk, April 12th, 1912, called upon the Railroad Company toanswer a petition of the "City "of New Orleans," and was therefore, fatally defective, and was, upon a special appearance entered solely for that purpose, excepted to by the Railroad Company, May 20th, 1912. (Record, pages 8-9.) This exception the Court, on the same day, sustained. It quashed the

notice theretofore issued. (Record, page 9.) No valid notice was issued until May 21st, 1912, and it was not served by the sheriff on the Railroad Company until May 31st, 1912. (Record, pages 10-13.)

It may well to examine what the record establishes with respect to the time the Railroad Company located or selected its route for its telegraph line.

Turning to the uncontradicted testimony of the witnesses, with respect to the date of locating the route selected by the Railroad Company, for its own line of poles and wires, we find that W. H. Courtenay (who is referred to in the brief of the Telegraph Company's counsel as "one of the de-"fendant's engineers, but who, in fact, was, as the Record shows, the Railroad Company's chief engineer), testifies on this point as follows (Record, page 116):—

> "*The Louisville and Nashville Railroad ordered its "employees, and the order came to me as head of the "maintenance of the road department*, and also to a "representative of the transportation department, and "chief operator, to locate for the Louisville and Nash-"ville a line of poles for a telegraph and telephone line "for its own purposes. Such a location was made. I "instructed Mr. W. G. Brown, roadmaster of the New "Orleans Division, to co-operate with Mr. R. R. "Hobbs, chief operator of the Railroad Company, to "locate a line of poles and lines, for the Louisville and "Nashville Railroad Company's use. That was done "by them."

Being asked what line was located in the New Orleans Division, he answered (Record, page 116):—

> "They located a line substantially as that now oc-"cupied by the Western Union Telegraph Company."

Being further asked if he knew the reasons for that choice, he gave in full (Record, pages 117-118), the reasons we have quoted in our original brief (pages 130-131). He further stated the pole line, when constructed by the Railroad Company on the present location, could be

used for both telegraph and telephone wires *and that he knew from the order of the board of directors and the authority thereby given,* it was the purpose of the Railroad Company to so use its pole line. (Record, page 118.)

Being asked if he had also received any oral instructions with respect to the location for the Railroad Company's telegraph line, he stated (Record, page 119):—

> "I did, from the *Fourth Vice President* * * *, "to have a Louisville and Nashville line of poles and "wires located actually on the right of way by sending "men over it to select the best location, and to locate "it, and to indicate on our right of way maps where "the best location is * * * for the poles and wires."

The Telegraph Company is in error when it asserts, in its brief, that the location made was "under instructions received from some *undisclosed* officer or representative "of the defendant company."

Courtenay also said (Record, page 119):—

> "We were merely given instructions to get the best "location for poles and wires for telephone and tele- "graph purposes. * * * These two representa- "tives of the company whom we had to locate the poles "and wires, went over the line on special trains for "the express purpose, and they did locate them and "reported on their location."

On being asked by the Telegraph Company's counsel when he had received these instructions from the executive officers of the Railroad Company to locate this line, he answered that it was a "good many months ago," but as he thought, within less than a year. (Record, page 120.) He further testified that he did not know the date the location was made in Louisana, but added (Record, page 120):—

> "We made these locations pretty generally over the "whole system and the orders were given at different "times. I think it has been nearly a year ago since

"the orders were given. They were not all given the "same time. The orders for one line were given at "one time and one line at another. I don't recall when "the order was given to locate here. Mr. Brown is "here and he can testify to that. He received the "order."

W. G. Brown, roadmaster of the New Orleans and Mobile Division (who with Chief Operator Hobbs made the location of the Railroad Company's telegraph line in Louisiana), when examined as to the date of such location, testified it had been within the preceding six months; that he had some maps, but did not know whether the dates were on them or not; that he had located the line or selected the route for a telegraph line, going over it with Chief Wire Inspector Hobbs, making plans therefor on the right of way maps; that the route selected was practically the same as that then occupied by the Telegraph Company, because it was the best and firmest ground, and away from the canal which exists on the north side of the track. (Record, pages 120-121.)

Charles Marshall, superintendent of said division since September 1st, 1886, when asked by the Railroad Company's counsel as to the date Brown and Hobbs had located on the ground the Railroad Company's telegraph line in Louisiana, testified (Record, page 133):—

"The chief engineer wrote to me on April 18th, "and I received the letter on April 20th, and I gave in- "structions on the same day in was received to the road- "master to locate a line in Louisiana in conjunction "with the chief operator of the line, which he did, and "indicated the location on the blueprints which I have "turned over to your office."

The Telegraph Company, in its Brief (page 18), says there was evidence that the selection of this particular line was considered the best route because the ground on that portion of the Railroad Company's right of way "was some- "what firmer than on the other side of the railroad track,"

leaving this Court to infer that was the only reason for its selection. That, however, was not the only factor which entered into such selection, as Chief Engineer Courtenay testifies. (Record, pages 117-118; Our Original Brief, pages 130-131.) The extraordinary expense and the interference with and obstruction of railroad operations, not to speak of the impracticability, of the construction, operation and maintenance of a telegraph line by the Railroad Company elsewhere or at any other location on its right of way, are abundantly established by the testimony embodied in the record and referred to in our original Brief. The economy and better operating conditions which would result from the preservation by the Railroad Company of its present location for its line of poles and telegraph, telephone and signal wires were likewise clearly shown at the trial, as the record shows. The Railroad Company, for many years prior to the trial, had owned, operated and maintained two circuits, consisting of four (4) telephone wires and also three (3) telegraph wires, attached to the Telegraph Company's poles at the location selected by the Railroad Company on its right of way for its own line of poles and wires. This is admitted by the Telegraph Company's own witnesses. (Record, page 87, at bottom; page 94, at top.) The same witnesses further admit that a line on the present location is cheaper to construct and maintain, and that there are places along the railroad right of way where another telegraph line could not be constructed without great expense. (Record, page 95.)

On the other hand, Chief Engineer Courtenay, being asked about the expense to the Railroad Company in putting up its own poles at the location it had selected and where its wires were then, and for years had been strung, said (Record, page 118):—

> "To construct poles close to and on the present line, "and to transfer the wires of the Louisville and Nash- "ville to the new pole line (could be done) at a trifling "expense."

It is certain, therefore, that the preferential right claimed and exercised by the Railroad Company in selecting the location on its right of way for the construction, operation and maintenance of its own line of poles and wires was, and is, based not merely on considerations of "conveni- "ence," as counsel for the Telegraph Company have urged in their Brief.

It is urged that "no evidence of any *corporate* action by "the defendant corporation, in this connection, was adduced." (Page 18.) No written evidence of corporate action was necessary, or required, to establish the fact that the Railroad Company had made selection of this particular part of *its own* right of way for a necessary adjunct in the conduct of its railroad business. It was quite sufficient to show, by the sworn testimony of its officials, that the Railroad Company did, in fact, take action in the premises, and that its fourth vice-president had given instructions to its chief engineer, long before this suit was instituted, to cause the best location to be made on its right of way for such line of poles and wires, not only in Louisiana, but on its entire system, in all the States wherein its railroads were operated, and that this had actually been done by subordinate officials in pursuance of those instructions.

No evidence was adduced by the Telegraph Company that any corporate action was taken, on its part, to select the location contended for. No such corporate action is alleged in the petition to have been taken. No evidence thereof, either oral or written, was introduced at the trial.

If evidence of corporate action in selecting a location for its telegraph line b ythe Railroad Company, on its own right of way, was essential to its validity, or to show a preferential right thereto, *a fortiori*, it was essential to allege and to produce, competent evidence of such corporate action on the part of the Telegraph Company, in its suit to expropriate.

The Telegraph Company errs in alleging that the Railroad Company really does not intend to build a telegraph or telephone line on its right of way, where it has located the same. The contrary clearly appears. A railroad cannot be operated

without a telegraph or telephone line, by which to direct and control the movement of passenger and freight trains. When the Telegraph Company gave its notice to the Railroad Company, August 17th, 1911, terminating the contract between the two companies at the end of one year thereafter, it was manifest to the Railroad Company that the necessity for the construction of its own telegraph and telephone line on its right of way had become absolute. It became necessary, either to construct, or to cease to transact the business of a common carrier by railroad. With that necessity staring its officials in the face, it was deemed wise and economical management, to secure an amendment to the charter of the Railroad Company to enable it, not only to construct, operate and maintain a telegraph and telephone line of its own for carrying in its railroad business, but also for commercial purposes. Steps to that end were taken, beginning as early as November 2d, 1911, when its board of directors, consisting of thirteen members, signed the amended articles of incorporation of that date, and acknowledged the same before notaries public of various States, on different dates, prior to November 23d, 1911, the day when said articles were lodged and recorded in the office of the Clerk of the County Court of Jefferson County, Kentucky, as required by law. (Record, pages 210-216.) These articles were also filed in the office of the Secretary of State of Kentucky, December 1st, 1911, and in the office of the Kentucky Railroad Commission December 4th, 1911, in accordance with Section 764, Kentucky Statutes. (Record, pages 216-218.) At the meeting of the board of directors, December 21st, 1911, a resolution was adopted, whereby the president was authorized and directed to execute the written acceptance by the Railroad Company of the restrictions and obligations of the Act of Congress of July 24th, 1866, and to file the same with the Postmaster General of the United States, as required by that Act. (Record, pages 208-210.) Such acceptance was duly executed by the president, on behalf of the Railroad Company, January 12th, 1912, and was filed with the Postmaster General January 15th, 1912. (Record, pages 219-220.) Thereupon the Executive Depart-

ment issued orders to the Chief Engineer to proceed to locate the best route on the Railroad Company's right of way, from both an economical and operating standpoint, for its telegraph and telephone line. These order were given at different times, not all at the same time, and the locations for such line were made "pretty generally over the whole sys-"tem." (Courtenay, Record, page 120.)

There were many good and sufficient reasons, such as economy in cost of construction, of maintenance, and of operation, and the nature of the existing physical conditions, which led to the selection of the locality whereon the poles and wires of the Telegraph Company, as well as the wires of the Railroad Company, had been for twenty-five years, operated. That location was the best to be found on the Railroad Company's right of way. Indeed, in many places, and for long distances, there was no other available for that purpose as the uncontradicted proof established.

It is a matter of wonder, therefore, that, acting under instructions of their superiors in office to select the best location, Roadmaster Brown and Chief Operator Hobbs selected and located the Railroad Company's line where they did, in April, 1912, and made out and traced their plans therefor on the right of way maps, and so reported the same to the Chief Engineer? They could not have done otherwise. They would have been disloyal to their employer and its interests had they selected or adopted any other location, even if any other had been practicable. The presence of the Telegraph Company's poles and wires did not affect, from a legal standpoint, the Railroad Company's right of choice. The right of way was its own property, of which it had the right of exclusive possession and use, at the expiration of the contract, an expiration brought about by the Telegraph Company, by its own deliberate, voluntary, act.

When the foregoing undisputed facts, disclosed by the record, are duly considered, it seems impossible to avoid their significance or the conclusion to be drawn from them,

as the Telegraph Company attempts to do, when it says in its Brief (page 21):—

> "It does not appear that the Louisville and Nash-
> "ville Railroad Company intends and proposes in good
> "faith to construct a line of its own on the location of
> "the line presently occupied by the Western Union
> "Telegraph Company."

Again, shutting its eyes to what the record actually contains, and, in lieu of argument on the facts proven, it is pleased to make this ungenerous, and unwarranted, assertion, in its Brief (page 22):

> "It is quite clear that this question has been injected
> "into this case simply by way of *subterfuge*, and as
> "a means of preventing or delaying the plaintiff com-
> "pany in obtaining the right of way to which, under
> "the law, it is *entitled*."

We submit that there is absolutely nothing in the record to justify this impugning the motives of the Railroad Company in the its defense of its property rights. It is manifest, from an examination of the record, that the Railroad Company, but for this condemnation proceeding, would, long since, have erected and put in operation its own telegraph and telephone line upon the location it selected therefor. Its purpose to do so in good faith is demonstrated by the testimony beyond controversy. In no other way can the Railroad Company faithfully serve the interests of its stockholders and free itself from a compulsory dependence upon the Telegraph Company, in the discharge of its public duties. It requires very little argument to demonstrate, in this case, that the Railroad Company will, at the earliest practicable date after the reversal of the judgment herein complained of, proceed to construct, maintain and operate, its own line of poles and wires, upon the location it has selected, on its own right of way.

No question of good faith was raised in the trial Court. There, the right claimed by he Telegraph Company was, to exclude the Railroad Company from the route it had

selected, on the theory that its suit was instituted before the Railroad Company had manifested its choice of such route. The Telegraph Company, by its previous occupancy of the route in question, under the contract of June 18th, 1884, had acquired no preferential right, on legal or equitable grounds, to continue such occupancy upon the expiration of that contract, to the exclusion of the owner, who was then, because of the tenant's action, compelled to select the same route for its own indispensable public uses and purposes. This was decided in Western Union Telegraph Co. vs. Pennsylvania R. Co., 120 Fed., 362, 369, affirmed by the Circuit Court of Appeals for the Third Circuit in 123 Fed., 33, and by this Court in 195 U. S., 594, cited in our original Brief (pages 80-81). In other words, the Telegraph Company in this case as in other like cases, stands on no different, or better, footing, than if it were a stranger company which had never had a contractural right to occupy the Railroad Company's right of way for telegraph uses and purposes. As was well stated by the Supreme Court of Georgia (138 Ga., 420, 427; 75 S. E. 471, 475, 477, cited in our original brief, pages 78-89):

> "In view of the Telegraph Company's voluntary ter-
> "mination of its contract with the Railroad Company,
> "the latter is compelled to erect and maintain its own
> "telegraph posts and wires, in order to operate its own
> "by means of electrical signals and orders. The Rail-
> "road Company contends that it should have the right
> "of prior selection in the location of a line of telegraph
> "for railroad use, and that it intends to erect poles
> "upon substantially the same location as at present
> "occupied by the Telegraph Company. * * * As-
> "suming, of course, the necessity of a line of telegraph
> "as auxiliary to the operation of a railroad company,
> "the Railroad Company would have the same right in
> "locating its telegraph lines as it would have in locating
> "its railroad track, or its depot, and its warehouses on
> "its own right of way. * * * It would indeed be
> "a most unfair demand to make of the owner of prop-
> "erty, charged with the discharge of a public duty, that

"he must take his property, subservient to the con-
"venience of the demandant who desires it for another
"public use."

The Court, in that case, further said:—

"The Railroad Company is held off by its contract
"from constructing its line of telegraph on that portion
"of its right of way which it prefers, and which it has
"selected, until the contract expires; and the Telegraph
"Company should not be given a preference, because it
"is not fettered by the same contract, in proceeding to
"condemn the same portions of the railroad right of
"way."

This decision by the highest Court of the State of Georgia rested, not on a question of priority of selection, but on a preferential right. Its decree was rendered July 11th, 1912, but though it was brought to the attention of a Court in the trial of this case three weeks later, that Court declined to follow it and said to the jury (Record, page 143):—

"I charge you that the Telegraph Company is entitled
"under the law of the State of Louisiana and the Fed-
"eral Statutes, to this right of way."

The Georgia Court, more than two years later, on September 30th, 1914, adhered to, and reaffirmed, its decision, in the cases of Nashville C. & St. L. Ry. *vs.* Western Union Telegraph Co., 83 S. E., 123, and Louisville & Nashville R. Co. *vs.* same, Ib., 126.

The Railroad Company, at the present time, is in the possession of its own right of way. The present occupancy by the Telegraph Company is as its tenant, and not as the result of any independent action.

The Railroad Company wishes to locate upon the site of the present poles and wires, other poles and wires which the voluntary action of the Telegraph Company makes it necessary for it to construct and to string.

It certainly is not compelled to do its telegraph business through the Western Union. It would be exceedingly ex-

pensive, and would amount to a relinquishment of its complete control of its operations.

The Telegraph Company says that because it has its poles and wires already constructed, it should be permitted to retain them where they are now located, although its duty under its contract was to remove them.

There is necessary coincidence in the site selected by the Railroad Company because the place of location is the best for its purposes. It was originally chosen under the contract of 1884 because of that fact.

It should not be compelled to fill up some of the marshy ground in order to obtain a new site for its poles and wires, when it has better ground belonging to it which it can occupy for the purpose.

The Telegraph Company admitted that its construction was somewhat ancient; but it prefers not to make a new one because of the expense which will be entailed.

The Railroad Company is particularly desirous to maintain control of its bridges over navigable streams—bridges which it constructed at a large expenditure. For an exceedingly small sum the Telegraph Company wishes to avail itself of this construction.

Why should the Railroad Company give preference to the Telegraph Company in a use of its right of way necessary for its telegraph purposes in such way as will best accomplish such purposes?

As between the Railroad Company, in possession of the right of way, for which it paid and which it constructed, and needs for its purposes, and the Telegraph Company which can locate elsewhere, and which was not compelled to remove, which has the best right?

Under the Act of 1866, the Telegraph Company could not occupy, without consent of the Railroad Company. The latter is unwilling to give its consent; but desires to occupy for its own purposes. What was done by the Telegraph Company which ousted the right of the Railroad Company, when the former saw fit to terminate its contract, to construct its poles and wires at a place best adapted for its purposes?

At the present time the Telegraph Company, if it has any right at all, has nothing more than a right to occupy under conditions, upon terms of compensation; but it can only occupy that which is not needed at the present time by the Railroad Company for its own purposes—the purposes for which it appropriated the right of way.

The theory of the Telegraph Company seems to be that from the moment it notified the Railroad Company it intended to occupy the site it has insisted upon, the latter lost all control over the same, and was obliged to seek another site for the erection of that which was necessary for its business, and for the purpose which it was authorized to transact, in the way of commercial telegraphing.

III. THE CONSIDERATION OF THE CONGRESSIONAL LEGISLATION REGULATING THE USE OF RIGHTS-OF-WAY OF RAILROAD COMPANIES IN CONNECTION WITH THE POWER OF THE STATE TO AUTHORIZE THE APPROPRIATION OF ANY INTEREST IN THE SAME BY A TELEGRAPH COMPANY.

We have discussed this subject as thoroughly as we deem necessary in the brief already filed.

On the 15th of June, 1866, what is known as "The "Railroad Act" was enacted by Congress, which, for the first time, asserted its right to regulate railroads under the commerce clause of the constitution (Section 5258, Revised Statutes).

In the case of Railroad *vs.* Richmond, 86 U. S., 584, this Court said:—

> "These Acts were passed under the power vested in "Congress to regulate commerce among the several "States, and were designed to remove trammels upon "transportation between different States which have "previously existed, and to prevent a creation of such "trammels in future, and to facilitate railway transpor- "tation by authorizing the construction of bridges over "navigable waters of the Mississippi; and they were "intended to reach trammels interposed by State enact-

"ments or by existing laws of Congress. * * *
"The power to regulate commerce among the several
"States was vested in Congress in order to secure equal-
"ity and freedom in commercial intercourse against dis-
"criminating State legislation."

The Act has been considered in this Court in the following cases:—

Bowman *vs.* Railroad, 125 U. S., page 465;
Dubuque R. R. Co. *vs.* Richmond, 86 U. S., page 590;
C. & N. W. R. R. Co. *vs.* Fuller, 84 U. S., 570;
Ill. Central R. R. Co. *vs.* State of Ill., 163 U. S., 142;
G. C. & S. F. Ry. Co. *vs.* Hefley, 158 U. S., page 99;
N. Y. R. Co. *vs.* State of New York, 165 U. S., page 628;
Lake Shore & M. S. R. Co. *vs.* Ohio, 173 U. S., page 286;
Mo. R. Co. *vs.* Haber, 169 U. S., page 613;
Union Pac. R. Co. *vs.* Chicago R. Co., 163 U. S., page 591.

In the Debs case, 158 U. S., page 579, this Court went so far as to say that under this Act it is competent for the National Government to remove all obstructions on highways, natural or artificial, to the passage of interstate commerce for the carrying of the mail and that this may be accomplished by direct force through the executive branch and in the use of the entire executive power of the nation.

In the Illinois Central case, 163 U. S., page 152, this Court said:—

"The State can do nothing which will directly bur-
"den or impede the interstate traffic of the company
"or impair the usefulness of its facilities for such traf-
"fic."

The Telegraph Act was passed a few days after the Railroad Act was passed and has been construed by this Court in the following leading cases:—

Pensacola Teleg. Co. *vs.* Western Union Teleg. Co. 96 U. S., page 1;
Western Union Teleg. Co. *vs.* Ann Harbor R. R. Co., 178 U. S., 239;
Western Union Teleg. Co. *vs.* Penn. R. R. Co., 195 U. S., 559;
Western Union Teleg. Co. *vs.* Attorney General 125 U. S., page 530;
St. Louis *vs.* Western Union Teleg. Co., 148 U. S., page 93;
United States *vs.* Union Pacific R. Co., 160 U. S., page 1.

In all of these cases it has been held that the Telegraph Company Act gave Telegraph Companies the right to occupy a railroad right of way, only by the consent of the railroad company.

The Western Union, in its petition, asserts that it has the right to maintain and operate its telegraph lines on the railroad right of way, though at the time of the filing of the petition its contract right was about to expire and it seeks in its petition to continue the maintenance of its lines thereon. Its occupancy at that time, conformed to the provisions of the Act of Congress, because it was there with the consent of the Railroad Company, the line being already constructed and in operation. In its petition it says, utterly without warrant, that it cannot procure the consent of the Railroad Company to maintain and operate its lines on the Railroad right of way at the expiration of the contract. The Act of Congress covers the construction, maintenance and operation of telegraph lines on a railroad right of way but it is silent as to the question of condemnation for original construction. This Court having held that the matter of telegraph companies acquiring the right to construct its lines on railroad right of way must be a matter of contract

or consent, the Western Union, failing to procure this consent, in it spetition, asked the Court, under the Acts of Louisiana to condemn this consent. The Louisiana Act provides for the construction (by condemnation), operation and maintenance of telegraph lines along and parallel to railroad rights of way, while the Act of Congress provides for the construction (by consent), operation and maintenance of telegraph lines along railroad right of way. There is no necessity to invoke the Louisiana statute for the purpose of constructing a telegraph line, because the petition avers that the line has already been constructed on the railroad right of way with the consent of the railroad company and is now being operated and maintained in accordance with the provision of the Act of Congress. Congress has covered the entire domain of the *construction, operation and maintenance* of telegraph lines on railroad right of way extending from State to State and this supercedes all State statutes on the subject and is a declaration, on the part of Congress, that such interstate highways shall be free from invasion "under State authority" and that they shall only be occupied by telegraph lines when the Railroad Company consents to the same.

In the present case, under the ruling of the Court from which the present appeal has been taken, notwithstanding the claim is substantiated by evidence that the operations of the Railroad Company would be obstructed, the Telegraph Company has been permitted to expropriate a portion of the Railroad right of way. This is done under State legislation, with the result that the operations of an interstate commerce railroad highway are interfered with.

Congress has withheld from the Telegraph Company the right compulsorially to enter upon the railroad right-of-way, and has approved of the use of the latter by the Railroad Company in interstate commerce. How can the State confer the right which Congress has denied?

The business which is transacted by the Telegraph Company is local as well as interstate. The right of expropiration is granted, *inter alia*, for State purposes.

IV. THE QUESTION OF THE RIGHT OF TELEGRAPH COMPANY TO EXPROPRIATE ANY PART OF THE RAILROAD COMPANY'S BRIDGES ACROSS NAVIGABLE STREAMS OR WATERS IN LOUISIANA.

This subject has also been so elaborately discussed in the brief already filed that it is not deemed necessary to add anything further thereto.

The Act of 23d March, 1906, referred to by the Telegraph Company as a foundation for its argument, has no applicability.

The Act referred to deals with future construction and maintenance of bridges across the navigable streams of the United States. The bridges in controversy were constructed before the passage of that Act.

The defendant in Error can derive no benefit from the part of Section 2, which it quotes, reading thus:—

> "And the United States shall have the right to con-
> "struct, maintain and repair, without any charge there-
> "for, telegraph and telephone lines across and upon said
> "bridge and its approaches."

In what way can it profit by the concluding portion, reading thus:—

> "And equal privileges in the use of said bridge and
> "its approaches shall be granted to all telegraph and
> "telephone companies."

This portion of the Act does not say that privileges must be granted; but that as to all bridges thereafter constructed one telegraph and telephone company shall not be preferred over another. The privileges granted to them must be equal.

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United States Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

U. S. Circuit Court of Appeal for the Fifth Circuit.

BRIEF ON BEHALF OF THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VERSUS

WESTERN UNION TELEGRAPH COMPANY,
DEFENDANT IN ERROR.

U. S. CIRCUIT COURT OF APPEAL FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

Statement.

This is a suit instituted by the plaintiff below to expropriate a right of way for its telegraph line along and parallel to defendant's railroad between New Orleans and Pearl River in the State of Louisiana. The plaintiff, the Western Union Telegraph Company, is a corporation organized under the laws of New York for the purpose of transmitting intelligence by telegraph, and the suit is brought under the terms of Act

No. 124 of the Acts of the General Assembly of the State of Louisiana for the year 1880, reading as follows—to wit:

"An act to amend and re-enact section six hundred and ninety-six of the Revised Statutes of the State of Louisiana, relative to telegraph companies.

"SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That section six hundred and ninety-six of the Revised Statutes of the State, as now in force, be and the same is hereby amended and re-enacted so as to read as follows:

"SECTION 696. 'Corporations chartered or formed under the laws of this or of any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone or other system of transmitting intelligence, the equivalent thereof which may be hereafter invented or discovered, may construct and maintain such telegraph, telephone or other lines necessary to transmit intelligence along all state, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; provided, that the ordinary use of such roads, works, railroads and waters be not thereby obstructed, and along the streets of any city, with the consent of the council or trustees thereof, and such companies shall be entitled to the right of way over all lands belonging to the State and over the lands, privileges and servitudes of other persons and corporations, and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right by consent, contract or agreement upon just and reasonable terms, then such companies or corporations shall have the right to proceed to expropriate the same, as provided in and by the laws of the State, relative to expropriation of lands for railroads and other works of public utility, and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this act shall have the power to contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands,

privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this act.'

"SEC. 2. Be it further enacted, etc., That this act shall be in force from the date of its passage and promulgation."

The "laws of the State relative to the expropriation of lands for railroads and other works of public utility" referred to in the foregoing act are the articles of the Civil Code of this State prescribing the procedure to be followed in expropriation suits, in regard to which no question is made in this Court.

The suit resulted in a verdict in accordance with the prayer of plaintiff's petition, the damages being assessed at the sum of six thousand dollars ($6,000).

Upon this verdict a judgment was entered to review which a writ of error was obtained from the Circuit Court of Appeals for the Fifth Circuit.

To review a judgment of that court affirming the judgment of the Circuit Court, this writ of error was obtained.

Assignments of Error.

The following are, as we understaud, the assignments of error now relied upon:

That the Court erred in refusing defendant's motion to direct a verdict in its favor made at the conclusion of all the evidence:

1. Because the plaintiff at the time this suit was instituted was not authorized to operate a telegraph system in Louisiana.

2. Because the defendant was entitled to a preferential right for telegraph purposes to the particular location or route sought to be expropriated by the plaintiff.

I.

The Claim that the Western Union Telegraph Company was not Authorized at the Time the Suit was Instituted to Own and Operate a Telegraph Line in Louisiana.

This claim is based upon the contention that under the terms of its charter and the laws of the State of New York, under which it is incorporated, the Western Union Telegraph Company was not authorized to acquire, own or operate a telegraph line in Louisiana, and upon the decision of the Supreme Court of this State—in the case of Southwestern Telegraph Company vs. Kansas City, Shreveport & Gulf Railway Company, 108 La., 686 (32 S. Rep., 958), to the effect that the statute of this State, under which this suit was instituted, cannot be availed of by a foreign corporation where, by the law of the State creating it, it is prohibited in express terms, or by implication, from operating in Louisiana.

We submit that this claim is without merit for two reasons:

(*a*) Because it is not true that under its charter and the laws of the State of New York, under which it is incorporated, the Western Union Telegraph Company was, at the time this suit was instituted, prohibited in express terms or by implication from operating in Louisiana.

(*b*) Because, in any event, under the Act of Congress of July 24th, 1866, the Post Roads Act, the benefits of which had been expressly accepted by the Western Union Telegraph Company, that company was authorized to conduct its business in Louisiana.

(*a*)

In order to determine whether the Western Union Telegraph Company was at the time this suit was filed prohibited in express terms or by implication by the laws of the State of New York, under which it is organized, from operating in Louisiana, a consideration of those laws is necessary, and for the convenience of the Court we have appended to this brief complete printed copies thereof.

It will be observed that the Act of April 12th, 1848, under which the plaintiff was originally incorporated under the name "New York and Mississippi Valley Printing Telegraph Company," authorized the incorporation of telegraph companies only "for the purpose of constructing a line of wires of telegraph through this state (New York) or from and to any point within this State (New York)" (Section 1 of Act of April 12th, 1848). When, therefore, on April 1st, 1851, the plaintiff was incorporated with a view to constructing and operating a line of telegraph between Buffalo, in the State of New York, and St. Louis, in the State of Missouri, it was recognized that under its New York charter the company could not operate beyond the limits of the State of New York, and accordingly after the designation of the proposed route of the line in the State of New York in Article 2 of the articles of incorporation it was provided in Article 3:

> "This Company shall own and operate the residue of said telegraph line from the boundary of the State of New York through the several states to the City of St. Louis, touching at Cleveland, Columbus and Cincinnati, and thence to St. Louis by such route as shall be designated by the directors, to be constructed by the said Sanford J. Smith and Isaac Butts under and by virtue of authority from said States, respectively, or from persons whose lands the said line may cross."

On April 8th, 1851, the act of that date entitled "An Act to amend an act entitled, 'An act to provide for the incorporation and regulation of telegraph companies passed April 12th, one thousand, eight hundred and forty-eight,'" was passed. By the terms of this Act of 1851 it was provided:

> "The directors or trustees of any telegraph company formed or incorporated under the Act entitled, 'An act to provide for the incorporation and regulation of telegraph companies, passed April 12th, one thousand, eight hundred and forty-eight,' may at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, extend their line of telegraph, or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company."

Construing this act in connection with the original Act of 1848, and the Statutes subsequently enacted, it is clear that it authorized upon the conditions stated simply the extension of their lines or the construction of additional branch lines within the limits of the State of New York by companies organized under the original Act of 1848 or the consolidation by such companies with other companies organized under the same act. It did not authorize at all the operation by such companies beyond the limits of the State of New York.

On June 29th, 1853, the Act of that date was passed entitled:

> "An act to amend an act entitled, 'An Act to provide for the incorporation and regulation of telegraph companies passed April 12th, one thousand, eight hundred and forty-eight."

This was the first act of the State of New York which authorized the incorporation of telegraph companies to do business beyond the limits of the State of New York. By the terms of Section 1 of this Act it was provided:

> "Any number of persons may associate, for the purpose of owning or constructing, using and maintaining a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions, and subject to the liabilities prescribed in the act passed April twelfth, one thousand, eight hundred and forty-eight, entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies.' And such association shall, upon complying with the provisions of said act, become a body corporate, and shall have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of its Board of Directors to organize under this act; which

said certificate shall contain the specifications required by the said recited act, and shall be proved or acknowledged, and recorded in the manner therein prescribed."

It will be observed that under the terms of Section 1 of the Act of 1853, quoted above, all that was required in order that a telegraph company then owning or using any telegraph line either wholly or partly within the State of New York might become a body corporate and entitled to the benefit of the provisions of the said Act of 1853, was that it should file in the office of the Secretary of State a certificate of a resolution adopted by a majority of its Board of Directors to organize under the said act, which said certificate must contain the specifications required by the said recited act and be approved or acknowledged and recorded in the manner therein prescribed, and a reference to Section 2 of the Act of 1848 will show that the specifications of the said certificate so required were:

1st. The name assumed to distinguish such association and to be used in its dealings and by which it may sue and be sued.

2nd. The general route of the line of telegraph designating the points to be connected.

3rd. The capital stock of such association and the number of shares into which the stock shall be divided.

4th. The names and places of residence of shareholders, and the number of shares held by each of them, respectively;

5th. The period at which such association shall commence and terminate.

It will be further observed that for the purpose of obtaining the benefits of this Act of 1853 no consent of the persons owning two-thirds of the capital stock of the company was required either expressly or by reasonable implication.

Thereafter, on January 20th, 1854, as appears on pages 171, *et seq.*, of the transcript, the plaintiff, under its then name, New York and Mississippi Valley Printing Telegraph Company, through its Board of Directors, took all the necessary proceedings to become a body corporate under the Act of June 29th, 1853, and to obtain the benefit of the provisions of that act.

The route designated in the resolutions so adopted, how-

ever, did not include the State of Louisiana, so that the plaintiff did not thereby acquire the right under the laws of the State of New York to do business in Louisiana.

By an act of the Legislature of the State of New York, passed on April 4th, 1856, the name of the plaintiff was changed from New York and Mississippi Valley Printing Telegraph Company to Western Union Telegraph Company.

On April 22d, 1862, the act of the Legislature of the State of New York of that date was passed, which we rely upon as evidencing plaintiff's right to do business in Louisiana.

Sections 1 and 2 of this Act read as follows :

> " Any telegraph company which is duly incorporated under and in pursuance of the act entitled, ' An Act to provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, eighteen Hundred and Forty-eight, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using, or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this act.
>
> " SECTION 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall own or hold any interest in such line or lines, or shall become lessee of any such line or lines, such company, within one year after constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or rather acquiring any other interest in such line or lines shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as pro-

vided in Section Two of the act hereby amended; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in subdivision five of the second section above mentioned."

It is quite clear that under the terms of Section 1 of this Act of April 22d, 1862, above quoted, any telegraph company duly incorporated under the original act of 1848, was authorized to construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of the State of New York, and that this section required no action whatever upon the part of the company as a condition precedent to the exercise of the said right.

The words in said section, " upon the terms and conditions and subject to the liabilities prescribed in said act " manifestly import simply that as to such additional lines as such company might construct under the permission granted by the said section, the company should be bound by the various provisions of the original Act of 1848, regulating the duties and liabilities of companies organized thereunder. That these words in Section 1 were not intended to require, as a condition precedent to the right of the corporation to construct such additional lines, that it should comply with the affirmative conditions precedent prescribed in the Act of 1848, is clear in view of the terms of Section 2 of the said act, which provided :

" In case of any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph not described in their original certificate of organization * * * such company within one year after constructing or becoming such owners or lessees * * * shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section 2 of the act hereby amended ; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and

seals, and shall be acknowledged by them, as prescribed in subdivision 5 of the second section above mentioned."

In other words, whereas, under the Act of 1848, the filing of the certificate referred to in Section 2 of the Act of 1862, was a condition precedent to the right of a company organized thereunder, to do business under the Act of 1862, as regards the additional lines authorized under the terms of Section 1 of the said act to be constructed and maintained no such condition precedent was prescribed, it being simply directed without provision of any penalty, that within one year after the construction of such additional lines the certificate in question should be filed in the office of the Secretary of State.

It will be observed that the requirement of the Act of 1862 in regard to the filing of the certificates in question is not even made in the form of a condition subsequent. The right to construct the additional lines is not granted upon condition that within one year after such construction the certificate in question shall be filed. The provision in regard to the filing of the certificate is purely directory. It is simply provided without provision for any penalty that within one year after the construction of such additional line or lines, the company shall file in the office of the Secretary of State the certificate in question. And under these circumstances we submit that it is impossible to affirm that the right of a corporation organized under the original Act of 1848, to own, use and maintain such additional lines of telegraph as it may have constructed under the permission granted by Section 1 of the Act of 1862, would be affected, at least as regards any person other than the State of New York, by the fact that it had failed within one year after the construction of the said line or lines to file with the Secretary of State the certificate required by Section 2 of the said act.

And in any event whatever may be said with regard to the authority *vel non* of the plaintiff to do business in Louisiana in the past, it is quite clear that independently entirely of this question the plaintiff at the time that it instituted this condemnation suit, was authorized, under the Act of 1862, to acquire, own and operate a telegraph line in Louisiana subject to the condition subsequent that within one year after its said

acquisition it would file with the Secretary of State of the State of New York the certificate required by Section 2 of the Act of April 22nd, 1862.

It seems to us impossible, therefore, to affirm that at the time this suit was instituted the plaintiff was not authorized under its charter and the laws of the State of New York to acquire, own and operate a telegraph line in the State of Louisiana.

And in this connection we call attention to the fact that this precise question has been decided in accordance with the view herein expressed by at least two Courts, to wit: the United States District Court for the Western District of Kentucky and the Circuit Court of Carroll County, Tennessee.

In the case of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, a condemnation suit similar to the one at bar, instituted under the Kentucky Statute, the United States District Judge of the Western District of Kentucky had occasion to deal with the question in a memorandum opinion handed down by him in connection with the judgment upon various demurrers filed by the Western Union Telegraph Company to various paragraphs of the answer filed in the said suit by the Louisville & Nashville Railroad Company. In this opinion, which has not been published, the Court said:

> "It is insisted, also, that the plaintiff, which is a New York Corporation, has not shown itself to possess authority under the laws of that State to call into exercise the powers of the State of Kentucky for the purpose indicated by the petition. We cannot agree that the statute of Kentucky is not broad enough to embrace a telegraph company with the powers given the plaintiff by the State of New York and this conclusion is emphasized in its application to this case by the recognition of the plaintiff as a corporation by the defendant, which has had large dealings with the plaintiff over a period of more than twenty-five years. Besides the failure of the plaintiff to perform any condition subsequent exacted by the New York statute does not *per se* avoid its powers, however much it might at the option of the State of New York be subjected to *quo warranto* proceedings. The State of New York might complain of the failure, if any, of the defendant to perform the condition subsequent referred to in the argument, or at

its option it might condone the fault, but it does not, under the circumstances of this case, appear to lie in the mouth of the defendant to complain of any failure of that sort, especially in view of its long course of dealings with the plaintiff on a contrary basis."

This precise question was considered by the Circuit Court of Appeals of the Sixth Circuit on the appeal and its conclusions are as follows:

"HAS APPELLEE CHARTER POWER TO CONDEMN THE LANDS IN QUESTION?

Appellee was incorporated under the New York telegraph act of 1848 (Laws 1848, c. 265), which provided for such organizations for the purpose of owning, constructing, using and maintaining lines of electric telegraph wholly within or partly beyond the limits of the state. Previous to 1862, according to its articles of incorporation, its line (so far as concerns the lines under consideration here) extended only from Cincinnati, through Covington, Georgetown and Frankfort to Louisville, with a branch to Lexington. In 1862 (Laws 1862, c. 425) the telegraph statute was so amended as to authorize any telegraph company incorporated under it to own, construct, use, and maintain any line or lines of electric telegraph not described in the original certificate of organization, whether wholly within or wholly or partly beyond the limits of the state of New York, upon the terms and conditions and subject to the liabilities prescribed in the original act, so far as applicable. In case of such construction, ownership, use, or maintenance of lines not described in the original certificate of organization, the company was required, within one year after such construction or acquirement of ownership, to file in the office of the Secretary of State of New York a certificate to be executed and acknowledged by at least two-thirds of the directors of the corporation, describing the general route of the line, and designating the extreme points connected thereby. No certificate covering the route in question seems to have been filed, and appellant now insists that appellee is without power to construct and operate the line in question, and so cannot take the benefit of the statutes of Kentucky and the other states involved, which grant the right of eminent domain for purposes of such construction and mainten-

ance, because prohibited by the state of New York from extending its operations beyond the limits stated in its articles of incorporation. It may be conceded that if appellee is prohibited by the laws of New York from owning, constructing, operating, and maintaining the telegraph lines in question, such prohibition would be available as a defense to one whose lands are proposed to be taken away without his consent. Case v. Kelly, 133 U. S., 21, 23, 10 Sup. Ct., 216, 33 L. Ed., 513; United States v. Northern Pacific R. R. Co., 152 U. S., 284, 300, 14 Sup. Ct., 598, 38 L. Ed., 443; Tulare Irrigation District v. Shepard, 185 U. S., 1, 7, 22 Sup. Ct., 531, 46 L. Ed., 773; Atkinson v. Marietta & Cincinnati Ry. Co., 15 Ohio St., 21. But does this prohibition appear? The failure to file the certificate of extended route does not have the effect of destroying the incorporation of the telegraph company. We may therefore lay out of account such decisions as deny the right of eminent domain to a mere *de facto* corporation. Nor is appellee without specific authority to extend its lines over the route in question. On the contrary, such authority is expressly conferred by the statute of appellee's creation. The only alleged infirmity is that the extended route has not been certified to the New York state authorities, as required by the act. But such certification is not made a condition precedent to the right of extension. To the contrary, permission to so extend previous to any certification thereof, or of intention to do so, is necessarily implied. It follows that if appellee's right to extend its lines over the existing routes is to be tested as of the time of its application to condemn for the purpose, a contravening of the New York statute could not be claimed, for that statute requires no certification until after the construction, etc. If, however, the date of original construction and operation of the lines is to be taken, the question then is, Has the right to continue such ownership and operation been lost; and, if so, how? The statute does not declare that the failure to certify the extended route within the designated period shall *ipso facto* work forfeiture of the right to continue the ownership and operation of such extended lines. Nowhere in the original act, or in the amendment of 1862, nor in any previous amendment to which our attention has been called, is there any provision whatever by way of penalty for failing to make such certification. In these circumstances, we think the applicable rule is that appellee's failure to make the certificate did not, *ipso facto*, terminate appellee's rights; that the state of

New York alone is concerned with the enforcement of this condition subsequent, and may either enforce it or waive it, as it may deem best. It follows that it does not lie with appellant to set up appellee's default in the respect stated as a defense to the condemnation proceedings. The following authorities are more or less pertinent to the subject: Matter of New York, etc., Bridge Co. v. Smith, 148 N. Y., 540, 546, 42 N. E., 1088; Briggs v. Cape Cod Ship Canal, 137 Mass., 71; Brown v. Wyandotte, etc., Ry. Co., 68 Ark., 134, 139, 56 S. W., 862, and following; Coe v. Gregory, 53 Mich., 19, 18 N. W., 541.

"The line of authorities holding that under the National Banking Act the only penalty for violation of certain administrative features of the act is forfeiture of the charter, while not strictly in point, have some bearing upon the general principles involved here" (Louisville & Nashville R. Co. vs. Western Union Tel. Co., 207 Fed. Rep., pp. 12, 13, 14).

And in the case of Western Union Telegraph Company vs. Nashville, Chattanooga & St. Louis Railway Company *et al.*, being a suit of the same nature, the Judge of the Circuit Court of Carroll County, Tennessee, in an opinion rendered on November 9th, 1912, used this language:

"The Court is of the opinion that the copy of its charter filed by the petitioner with the Secretary of State of Tennessee is a substantial compliance with the laws of Tennessee in requiring foreign corporations to file their charters with the Secretary of State before doing business in Tennessee, and that the petitioner is authorized by the laws of New York, and of Tennessee to prosecute this suit for condemnation. The Court is also of the opinion that under the Act of 1862 of the State of New York petitioner has twelve months after acquiring in this State a line with which to do business to file with the Secretary of State of New York the certificates required by the said act."

We submit, therefore, that there is no merit in plaintiff's assignment of error in so far as it is based upon this ground.

(b)

In the alternative and in any event, we submit that the plaintiff at the time this suit was instituted was entitled to operate in this State under the terms of and by virtue of the Act of Congress of July 24th, 1866, the Post Roads Act, the benefits of which it had formally accepted.

Counsel for the defendant in their brief in the Court below were at pains to demonstrate that the Act of Congress in question confers upon a telegraph company, which has accepted its terms, no right of expropriation. This we fully and freely concede. Plaintiff's right of expropriation is derived solely from the State statute. The question involved here is, however, fundamentally different, viz., whether the Act of Congress confers upon a corporation which has accepted the benefits of the act a right to transact business in the State. We submit that it does.

That under the commerce clause of the Federal Constitution it is within the constitutional power of Congress to affirmatively confer upon a corporation engaged in interstate commerce the right to transact business in any State, will, we assume, be admitted. And that the Act of Congress in question does confer such a right upon corporations which have accepted the benefits of its provisions, has, we submit, been decided in effect by this Court.

In the case of Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, in which the validity of an act of the Legislature of the State of Florida, purporting to grant to the Pensacola Telegraph Company the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa in the said State, was involved, this Court had occasion to consider the effect of the Act of Congress of July 24th, 1866, in this connection. The question was as to the right of the Western Union Telegraph Company, the plaintiff in this case, to operate in the counties in question. The question might perhaps have been decided independently of the provisions of the Act of Congress of July 24th, 1866, upon the ground simply that inasmuch as the Western Union Telegraph Company was engaged in interstate commerce, without regard to any grant in this respect from Congress, it was incompetent for the State of

Florida to exclude it from doing such business in any portion of the State. The decision was not pitched, however, upon this ground, but upon the ground that under the terms of the Act of Congress the benefits of which had been accepted by the Western Union Telegraph Company, it had acquired an affirmative grant of a right to do business in the State. Referring to the act of the Legislature of Florida which was in question, the Court said:

> "It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24th, 1866, in effect amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction if they accept the terms proposed by the national government for this national privilege. To this extent certainly the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erecting the necessary structures for its business; but it does provide that w henever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And in the case of Western Union Telegraph Company vs. Wright, 185 Fed., 250, the Court of Appeal for the Fifth Circuit distinctly held that the purport and effect of the Act of Congress of July 24th, 1866, was to confer a franchise upon corporations which had accepted the benefits of its provisions to use the military or post roads of the United States, including all railroads wherever situated for the purposes of its business.

We submit, therefore, that insofar as is concerned the right of the plaintiff in this case at the time this suit was instituted to own and operate in this State a line of telegraph along the right of way of the Louisville and Nashville Railroad Company, the right was not merely conferred by the laws of the State of New York under which the plaintiff was organized as a corporation, but also by the Act of Congress of July 24th, 1866, the benefits of which had been accepted by the plaintiff.

And inasmuch as the statute of this State under which the suit was brought certainly authorized the expropriation of a right of way along and parallel to any railroad in the State by any telegraph company which is authorized legally to operate such line of telegraph in this State, we submit that there is no merit in the contention of defendant's counsel that the plaintiff was not entitled to avail itself of this statute.

The decision of the Supreme Court of this State in the case of Southwestern Telegraph Company vs. Kansas City Shreveport & Gulf Railway Co., 108 La., 688, is wholly inapplicable.

II.

The Claim that the Defendant was Entitled to a Preferential Right for Telegraph Purposes to the Particular Location or Route Sought to be Expropriated by the Plaintiff.

The following are the facts in relation to which this claim is to be considered:

The route sought to be expropriated in this case is that presently occupied by the plaintiff. The line was built many years ago and has been maintained and operated up to the date of the filing of this suit under the terms of a contract between the plaintiff and the defendant. This contract being about to expire, the plaintiff, in accordance with the requirement of the statutes of this State that before the filing of an expropriation suit an attempt shall be made to agree with the defendant as to the terms upon which the right desired may be obtained,

addressed, through its counsel, to the defendant, the communication appearing at pages 194 and 195 of the transcript, in which it advised the defendant of its desire to acquire the right to maintain, after the expiration of the said contract, its existing telegraph line, and made an offer of a price which it was willing to pay for the said right. This communication was dated March 16th, 1912. It is admitted that no reply was vouchsafed thereto (Tr., page 68). Accordingly, on April 12th, 1912, this suit was filed in the Civil District Court for the Parish of Orleans, State of Louisiana. Various proceedings were had in the State Court, all tending to delay the progress of the suit which finally resulted in removal of the suit to the United States District Court. This removal was effected on June 17th, 1912. The case was finally set for trial on August first in the District Court. On July 29th the defendant appeared and filed numerous exceptions. These exceptions were taken up on August first, the date upon which the case was set for trial, and were overruled. Thereupon the defendant filed its answer in which, among other numerous defenses, there was set up for the first time the defense now insisted upon here, that the defendant desired to use and was entitled by preference to use for telegraph purposes the particular route along its right of way which was sought to be expropriated by the plaintiff, and in support of this defense there was adduced evidence to the effect that after the institution of the present suit, one of the defendant's engineers, acting under instructions received from some undisclosed officer or representative of the defendant company, had proceeded to locate for the defendant the route of a proposed telegraph line on its right of way between New Orleans and Pearl River, and had located for this purpose the exact route which had been occupied for years by the defendant, and which the defendant was seeking to expropriate in this suit. There was further adduced evidence to the effect that this particular route had been so selected by this engineer for the reason that it was considered the best route in view of the fact that the ground of the particular portion of the right of way so located was somewhat firmer than on the other side of the railroad track.

It will be observed that no evidence of any corporate action by the defendant corporation in this connection was adduced. No evidence of the intention of the defendant to

really build a telegraph line of its own along its right of way was adduced except the testimony of the engineer in question that he had been directed by some officer of the company, after the institution of the present suit, to locate a route for such a line. And no justification, whatever, for the selection of the particular route then occupied by the plaintiff was shown beyond the statement that the ground along that particular route was firmer than that on the other side of the track.

In this connection it further appeared from the uncontradicted testimony of witness, J. D. Hilbert, on behalf of the plaintiff, that it would be entirely practicable for the defendant if it desired to do so to build and operate another line of telegraph on the same side of the right of way as that occupied by plaintiff's line.

Upon this evidence it is claimed that it was the duty of the Court to direct a verdict in favor of the defendant.

We submit that this position is untenable.

We deny in the first place that in such a case as this the defendant had any such preferential right as is claimed. The statute of this State under which this suit is instituted provides that corporations chartered for the purpose of transmitting intelligence by telegraph may construct their lines along and parallel to any of the railroads in the State provided only "that the ordinary use of such roads be not thereby obstructed." Under the terms of this statute it is submitted that when a particular right of way for a telegraph line along a railroad in this State is sought to be expropriated by a telegraph company, the mere fact that after the institution of such suit the railroad company may have had located a route for a telegraph line of its own for railroad purposes identical with that which has been selected by the telegraph company, there being no evidence whatever that it really intends to build the line, will constitute no defense to the suit even if it be true that the particular route so selected for expropriation is somewhat more convenient than other available routes provided such other routes are available. Under such circumstances, we submit that the additional inconvenience to which the railroad company may be put in the matter of the construction of its own line of telegraph if it should ultimately determine to build the same is merely a matter to be considered by the

jury in the estimation of the damages to be assessed as against the telegraph company. And particularly is this true, we submit, where the route proposed to be expropriated by the telegraph company is one already occupied by it which it could not change without enormous expense.

It is true that in the case of Western & A. R. Co. vs. Western Union Telegraph Company, 75 S. E., 471, 138 G., 420, the Supreme Court of Georgia seems to have affirmed the preferential right claimed by the defendant in this case, where it appeared that the railroad company intended and purposed in good faith to construct a line of its own on the location of the old telegraph line which is shown to be located on an advantageous portion of the right of way.

This decision, however, has no binding force as authority upon this Court, and the question has been decided otherwise by another Court.

In the opinion of the United States District Court for the Western District of Kentucky in dealing with a demurrer filed by the Western Union Telegraph Company to a paragraph of the answer of the Louisville and Nashville Railroad Company, setting up the defense here under consideration, among others, said:

> "The Court is in some doubt as to what should be done with the general demurrer to paragraph thirteen of the answer, but has concluded to overrule it, although in doing so it by no means intends to intimate that it yields to the defendant's contention that the defendant has the right to choose what part of its right of way shall be taken by the plaintiff, or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of Section One of the act does not seem to confer any rights upon the defendants as to a non-existing telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view we take. Indeed, there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had and which it desires to hold shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it desires, though this, of course, is subject

to the other provisions of the act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. The important thing is giving the owner compensation for what in fact is taken. The taking of one particular part of a thing may involve greater compensation, including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires. It is largely because this paragraph may show certain things which possibly may more or less affect compensation that we overrule the demurrer to it."

In any event, however, we submit that the decision in the case of Western & A. R. Co. vs. Western Union Telegraph Company, *supra*, is inapplicable to the facts disclosed by this record.

It does not appear that the Louisville and Nashville Railroad Company intends and proposes in good faith to construct a line of its own on the location of the line presently occupied by the Western Union Telegraph Company.

As above stated, all that appears is that one of the engineers of the company was directed to locate a route for such a line. Whether the Louisville and Nashville Company purposes to build a line along the route so located does not appear.

It is submitted that the situation in this regard is the same as it would have been if evidence had been adduced of circumstances indicating merely that the Louisville and Nashville Railroad Company might in the future desire to build another track along that portion of the right of way sought to be expropriated. It is quite clear that this would have constituted no defense whatever to plaintiff's suit. The test to be applied in this connection under the terms of the Louisiana statute is simply whether the use by the telegraph company of the right of way sought to be expropriated will presently interfere with the ordinary use of the railroad.

The mere fact that this use may in the future be interfered with, in view of a necessity that may arise for the laying of additional track or the building of a telegraph line of its own, would constitute no valid defense, whatever. The possibility of such future interference is fully provided for in the judg-

ment rendered in this case, as it is in all such cases, by that clause of the judgment which reads as follows, to wit:

> "The whole of said line shall be so constructed and maintained as not to interfere with the use of its said right of way by the defendant for the purposes of its business of operating a railroad, and if at any time in the future it shall become necessary for the defendant to change the location of its tracks, or to construct new tracks or side tracks or other structures for the purposes of its said railroad business, and for such purposes to use and occupy the portion of the right of way on which plaintiff's telegraph line may be, then the plaintiff shall, at its own expense, upon reasonable notice from the defendant, remove its poles, cross-arms and wires to such other point or points on such right of way as may be reasonably designated by the defendant."

It is submitted that this record does not disclose that at this time the Louisville and Nashville Railroad Company purposes and intends in good faith to build a line of telegraph of its own along its right of way.

If it should in the future determine in good faith to build such line for railroad purposes, the question will then arise under the terms of the clause of the judgment in this case above referred to, whether the Western Union Telegraph Company, under the circumstances, can be compelled to remove its line from its present location.

Even in such event it seems to us unthinkable that upon evidence such as has been adduced in this case any Court would compel such removal. We submit, however, that this question is not presented for decision in this case.

So far from the record disclosing any *bona fide* intention upon the part of the Louisville and Nashville Railroad Company to build a telegraph line of its own on the right of way in question here, we submit that it is quite clear that this question has been injected into this case simply by way of subterfuge, and as a means of preventing or delaying the plaintiff company in obtaining the right of way to which, under the law, it is entitled.

In this connection it is to be observed that there is something more than a mere private interest involved here. The right of expropriation claimed by the plaintiff in this suit is

one granted not in the interest of the plaintiff corporation, but in the interest of the public, to which it is a matter of vital concern that the plaintiff should be enabled to discharge its functions as a public service corporation.

It is true, of course, that it is equally to the interest of the public that the defendant should not be interfered with in the performance of its duties as a public corporation. We submit, however, that it does not appear that an affirmance of the judgment, which has been rendered by the lower Court, will interfere to any appreciable extent with the use by the defendant of its property.

In the one case, if the judgment is reversed, the contract under which the plaintiff has occupied the right of way in the past having expired, it will be left without any legal right in the premises and will be disabled from performing its duties to the public at least until it shall have secured a judgment of condemnation in another suit, and even in such event, will be subjected to the enormous expense of entirely reconstructing its line.

On the other hand, if the judgment as affirmed, and even if it be conceded that the defendant will be under the necessity of constructing a line of telegraph of its own along the right of way, the most that can be said is that it may have to construct this line at a location on the right of way which would involve a trifle more expense than if it was constructed upon the exact route occupied by the plaintiff, and this, was, of course, a consideration which was considered by the jury in the estimation of the damages to which the plaintiff was entitled in the premises.

III.

The question of congressional legislation regulating the use of rights of way of railroad companies and whether a State can authorize the appropriation of any interest in the same by a telegraph company considered.

The principles announced in the authorities cited in the brief of plaintiff in error upon this question will not be dis-

puted in any respect. Their application, however, to the situation presented upon this record is the real question under this branch of the case, and defendant in error contends that they have no application to the case at bar for the reason that the Acts of Congress cited do not cover the questions involved in this case.

The first act cited simply regulates the operation of the railroad company by providing that it is authorized to carry upon its road passengers, troops, government supplies, mails, freight and property on their way from any state to another, and to receive compensation therefor, and to connect with roads from other states so as to form continuous lines for the transportation of the same, thus regulating their functions as interstate carriers, principally with respect to governmental service which may be required. This act does not in any respect even indirectly regulate or apply to the question of the right of a state to permit appropriation for a telegraph company for public use of a portion of the right of way of the railroad company not necessary for the use of the railroad company, and not interfering with the operation of the railroad.

The second Act of Congress referred to is the Act known as the Telegraph Act, approved July 24, 1866. This Act has been declared by this court again and again to be permissive in its nature, and to permit a telegraph company to construct its lines along post roads. The fundamental purpose of the Act, like the Act previously referred to is to secure, as far as such Act will enable the Government to secure, facilities for the transmission of telegraphic communications between the several departments of the United States and their officers and agents. Coupled with this was the privilege to the Government to purchase the telegraph lines.

This Act, again, does not in any way, either directly or indirectly, provide for any appropriation by telegraph companies under the power of eminent domain, either state or national, of the rights of way of railroad companies, as this court has repeatedly declared. If this Act had provided either the power of appropriation or the method of appropriation coupled with the power, it might be claimed by plaintiff in error that such power and method were exclusive in their nature. But the Act has not done so, and therefore the authorities cited by plaintiff in error in support of its propo-

sition under this Act, show that the Act does not and was not intended to cover that which is the subject matter of the case at bar, within the decisions of this court.

The same thing may be said with respect to the third Act, under which the railroad companies having telograph lines are authorized to use them for the transmission of messages for the Government and for the general public according to the provisions of the Act of July 24, 1866, and what we have said with respect to that Act will equally apply to this Act; it is simply an extension of the provisions of the Act of 1866 to railroad companies when they accept its provisions according to its terms.

There is, therefore, on principle, no basis whatever for the argument and the conclusions sought to be drawn from these Acts that Congress, by its legislation has occupied the field and that therefore that the states are excluded from enacting legislation (as in the case of the Louisiana statute under which this proceeding was instituted) having application to railroads engaged in interstate commerce.

Tnis question was presented to the United States District Court at Louisville, Kentucky, and the conclusion contended for by the telegraph company in the case at bar was sustained by that court.

On appeal the Circuit Court of Appeals for the Sixth Circuit, in affirming the decision of the lower court, in 207 Fed., 11, said:

> IS THE KENTUCKY CONDEMNATION STATUTE INVALID AS ATTEMPTING TO REGULATE INTERSTATE COMMERCE?
>
> By virtue of Act June 15, 1866, c. 124, 14 Stat. 66 Rev. Stat. Sec. 5258 (U. S. Comp. St. 1901, p. 3565), and Act June 8, 1872, c. 335, 17 Stat. 308, 309 (Rev. Stat. Sec. 3964 (U. S. Comp. St, 1901, p. 2707), all railroads are made government post roads. By Act July 24, 1866, c. 230, 14 Stat. 221 Rev. Stat. Secs. 5263-5269 (U. S. Comp. St. 1901, pp. 3579, 3580), telegraph companies are authorized to construct, maintain, and operate lines of telegraph on the public domain and over and along post roads of the United States, such lines to be so constructed and maintained as not to interfere with the ordinary travel on such roads; provision being made for the transmitting of telegrams both for the public

and for the government by railroads having telegraph lines. The transmitting of telegraphic communication is commerce, and telegraph companies doing interstate business are federal instrumentalities of commerce and subject to the jurisdiction of Congress under the commerce clause of the Constitution. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8, 24 L. Ed. 708, and following. By the act creating the Commerce Court, Act June 18, 1910, c. 309, 36 Stat. 544 (U. S. Comp. St. Supp. 1911, p. 1288), the provisions of the commerce act were extended to telegraph companies.

Appellant contends that by the legislation referred to Congress has occupied the field of regulation with respect to both railroad and telegraph companies engaged in interstate commerce, and by the telegraph act of 1866 referred to has deliberately withheld from telegraph companies the right of eminent domain, and evidenced an intention that telegraph companies may construct and operate telegraph lines on railroad rights of way only with the consent of the railroad companies, thus excluding the states from jurisdiction over that subject. If Congress had so occupied the field and evidenced such intention, the claimed result follows. Northern Pacific Ry. Co. v. State of Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; Second Employers' Libility Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Fd. 314. But the mere fact that Congress has legislated upon the general subject does not exclude state legislation, unless an intent exclusively to occupy the field is indicated, except where the state legislation conflicts with the federal. See Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Fd. 1511, recently decided by the Supreme Court. The case specially relied upon to support the contention that Congress has denied to telegraph companies eminent domain on railroad rights of way is Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Fd. 312, 1 Ann. Cas. 517, cited in an earlier part of this opinion. That case, in our opinion, lends no support to this contention. True, it was there held that the act of 1866 did not confer upon telegraph companies the right of eminent domain, or authorize the occupation by telegraph companies of the rights of way of railway companies without the consent of the latter; and, as there was in that case no state statute which was even claimed to

give such right, the effect of such statute had there been one, was expressly passed by without determination. There is, however, in our judgment, nothing in the opinion cited which even impliedly casts doubt upon the validity of such state legislation. On the contrary, certain decisions of the inferior federal courts sustaining the right of eminent domain under state statutes are there cited without disapproval.

In the Pennsylvania case Congress was not declared to have occupied the field of regulation in the respect stated, nor to have indicated an intention to exclude the exercise of eminent domain under state legislation. On the contrary, "the fundamental idea and sole purpose" of the act of 1866 was held to be "a prohibition of all state monopolies," citing and relying upon Pensacola Telegraph Co. vs. Western Union Telegraph Co., *supra*. As expressed in Western Union Telegraph Co. vs. Richmond, 224 U. S., 160, 169, 32 Sup. Ct., 449, 451 (56 L. Ed., 710):

"It (the act of 1866) made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own."

Not only do we see nothing in the Act of 1866 indicating an intention by Congress to exclude the power of the states to grant telegraph companies the right of eminent domain with respect to railroad rights of way, but we think such statutes directly promote the object of the federal statute as declared in the Pennsylvania and Richmond cases, and that it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain.

IV.

The question of the right of the Telegraph Company to expropriate any part of the Railroad Company's bridges across navigable streams or waters in Louisiana considered.

In the brief filed by plaintiff in error the contention is made that the telegraph company has no such right, and the Act of Congress of March 23, 1906, entitled An Act to Regulate

the Construction of Bridges over Navigable Waters (37 Stat., 84) is relied upon as a foundation for the argument.

The first section of this Act requires, as a condition precedent to the construction and maintenance of a bridge across the navigable waters of the United States, that its plans and a map of the proposed location shall have been submitted to the Secretary of War for approval, and until approved the right to construct and maintain such bridge is not granted.

By the second section of the Act such bridge is held to be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission of the mails, troops and munitions of war of the United States than for the transportation over any railroad, street railway or public highway leading to said bridge.

The concluding part of section 2 reads as follows:

> "and the United States shall have the right to construct, maintain and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies."

The latter part of section 2 thus recognizes the right of all telegraph and telephone companies to an equality of privileges upon the bridge and its approaches. The proper interpretation of this provision would seem to be that a telegraph company having or securing the right to construct and maintain its line along the right of way should equally secure rights in and along the bridge and its approaches over said navigable waters as a constituent part of the railroad line, and no reason can be given why such bridges over navigable waters constructed in accordance with the Acts of Congress (as presumably the railroad bridges in this case are) should not be treated as a constituent or component part of the railroad company's line.

The Act of Louisiana evidently contemplates this for it provides that a telegraph company may construct and maintain such telegraph lines "* * * along and parallel to any of the railroads in the State; provided, that the ordinary use of such roads, works, railroads and waters be not

thereby obstructed," and further we have the provision that the lines shall be so constructed as "not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised."

This Act has, we submit, been properly construed by the District Court as bringing the structures over the navigable waters within the same rule under the State statute as the right of way obtained, and nothing in the Act of Congress of March 23, 1906, militates against this construction; on the contrary that Act would seem to indicate the intention of Congress that the telegraph company should have the same privileges with respect to the bridges and approaches as with respect to any other portions of the right of way, and if one is subject to the exercise of the right of eminent domain, there is no reason to suppose that either Congress or the Legislature of Louisiana intended to withhold the other therefrom.

It is submitted that the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES P. FENNER,
GEORGE H. FEARONS,
RUSH TAGGART,
Attorneys for Western Union Telegraph Company.

APPENDIX.

An Act to Provide for the Incorporation and Regulation of Telegraph Companies, Passed April 12, 1848.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. Any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, or from and to any point within this State, upon such terms and conditions, and subject to the liabilities prescribed in this act.

"SEC. 2. Such persons, under their hands and seal, shall make a certificate which shall specify:

"1st. The name assumed to distinguish such association, and to be used in its dealings, and by which it may sue and be sued.

"2nd. The general route of the line of telegraph, designating the points to be connected.

"3rd. The capital stock of such association, and the number of shares into which the stock shall be divided.

"4th. The names and places of residence of the shareholders, and the number of shares held by each of them, respectively.

"5th. The period at which such association shall commence and terminate, which certificate shall be proved or acknowledged, and recorded in the office of the clerk of the county, where any office of such association shall be established, and a copy thereof filed in the office of the secretary of state. Such acknowledgment may be taken by any officer authorized to take the acknowledgment of deeds of real estate, at the place where such acknowledgment is taken.

"SEC. 3. Upon complying with the provisions of the last preceding section, such association shall be, and hereby is declared to be, a body corporate, by the name so as aforesaid to be designated in said certificate; and a copy of said certificate, duly certified by the clerk of the county where the same is filed and recorded or by the secretary of state, may be used

as evidence in all courts and places, for and against any such association.

"SEC. 4. Such association shall have power to purchase, receive and hold, and convey such real estate, and such only as may be necessary for the convenient transaction of the business, and for effectually carrying on the operations of such association, and may appoint such directors, officers and agents, and make such prudential rules, regulations and by-laws, as may be necessary in the transaction of their business, not inconsistent with the laws of this State or of the United States.

"SEC. 5. Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines, provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said water; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this State.

"SEC. 6. If any person over whose lands said lines shall pass, upon which said posts, piers or abutments shall be placed, shall consider himself aggrieved or damaged thereby, it shall be the duty of the County Court of the county within which said lands are, on the application of such person, and on notice to said association (to be served on the president or any director) to appoint five discreet and disinterested persons as commissioners, who shall severally take an oath before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act. And it shall be the duty of said commissioners, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments; duplicates of which said appraisement shall be reduced to writing, and signed by said commissioners, or a majority of them; one copy shall be delivered to the applicant, and the other to the president, or any director or officer of said association or corporation, on demand; and in case any damage shall be adjudged to said applicant, the association or corporation shall pay the amount thereof, with

costs of said appraisal, said costs to be liquidated and ascertained in said award, and said commissioners shall receive for their services two dollars for each day they are actually employed in making said appraisement.

" SEC. 7. Any person who shall unlawfully and intentionally injure, molest or destroy any of said lines, posts, piers or abutments, or the materials or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the Court before which the conviction shall be had.

" SEC. 8. It shall be lawful for any association of persons organized under this act, by their articles of associations, to provide for an increase of their capital, and of the number of the association.

" SEC. 9. Any association or company now organized and using Morse's telegraph may organize as a corporation under this act on filing in the office of the secretary of state a resolution of its Board of Directors, signed and certified by the officers of the company, of its desire so to organize, and upon publishing notices to this effect in some one newspaper in the City of New York and the City of Buffalo, and the City of Albany, three months previous to such organization, provided that two-fifths of the owner of the stock of said company or association do not dissent therefrom ; provided, that any stock or shareholder in any such association or company may, on giving thirty days' notice to the officers, or any of them, of such association or company, at any time before such organization, refuse to go into such organization, and thereupon such stock or shareholder shall be entitled to receive from such association or company, the full value of his shares or stock in such association or company.

" SEC. 10. The stockholders of every association organized in pursuance of this act shall be jointly and severally personally liable for the payment of all debts and demands against such association, which shall be contracted or which shall be or shall become due during the time of their holding such stock ; but such liability of any stockholder shall not exceed twenty-five per cent. in amount, the amount of stock held by him, and no stockholder shall be

proceeded against for the collection of any debt or demand against such association, until judgment thereon shall have been obtained against the association, and an execution on such judgment shall have been returned unsatisfied in whole or in part, or unless such association shall be dissolved.

" SEC. 11. It shall be the duty of the owner or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch.

" SEC. 12. It shall likewise be the duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons whose dispatch is postponed outside of its order, as herein prescribed; provided, however, that arrangements may be made with the proprietors or publishers of newspapers, for the transmission for the purpose of publication of intelligence of general and public interest, out of its regular order.

" SEC. 13. This act shall take effect immediately."

An Act to Amend an Act, entitled " An Act to Provide for the Incorporation and Regulation of Telegraph Companies," Passed April Twelfth, One Thousand Eight Hundred and Forty-eight. Passed April 8, 1851.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

" SEC. 1. The directors or trustees of any telegraph company formed or incorporated under the act entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, one thousand, eight hundred and forty-eight, may, at any time, with the written consent of the persons owning two-thirds of the capital stock of

such company extend their line of telegraph, or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company.

"SEC. 2. This act shall take effect immediately."

An Act to Amend an Act, entitled, "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," Passed April Twelfth, One Thousand Eight Hundred and Forty-eight. Passed June 29, 1853.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SEC. 1. Any number of persons may associate, for the purpose of owning or constructing, and maintaining, a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions, and subject to the liabilities prescribed in the act passed April twelfth, one thousand eight hundred and forty-eight, entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies.' And such association shall, upon complying with the provisions of said act, become a body corporate, and shall have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of its Board of Directors to organize under this act; which said certificate shall contain the specifications required by the said recited act, and shall be proved or acknowledged, and recorded in the manner therein prescribed.

"SEC. 2. Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over or under any of the public roads, streets and highways; and through, across, or under any of

the waters within the limits of this State, subject to the restrictions in the said recited act contained; and also to erect and construct such fixtures upon, through or over any other land, subject to the right of the owner or owners thereof to full compensation for the same; and if any such association cannot agree with the owner or owners of any land taken or used by such association for the compensation to be paid therefor, it shall or may be lawful for such association, or such owner or owners to apply to the County Court of the county in which such lands are, by petition, stating the facts in relation thereto; and after the expiration of twenty-one days from the filing of such petition, and notice thereof given to such association, or to the owner or owners of such land, as the case may be, it shall be the duty of the said Court to appoint five disinterested persons to make a just and equitable assessment and appraisal, in the manner directed by the said recited act of the loss or damage, if any, which may have been, or is likely to be, sustained by the owner or owners of such land, taken or used as aforesaid, whilst such land shall have been, or shall continue to be used as aforesaid. And such assessment and appraisal shall determine the rent or compensation to be paid by such association for such use, or in lieu thereof, a sum in gross as the compensation for allowing the fixtures belonging to such association permanently to continue, and the same to be repaired, improved and renewed, or removed from time to time, as such association may require.

"SEC. 3. Every such company, owning or using a line of electric telegraph, partly within and partly beyond the limits of this State, shall render to the proper officer a true report of the cost to such company of their works within this State; and the stock of such company in amount equal to such cost, or the dividends thereof, shall be subject to taxation in the same manner, and at the same rate, as the stocks or dividends of other companies incorporated by the laws of this State are subject.

"SEC. 4. The liability of any share or stockholder in any company organized under this act, as provided for in the act of which this is an amendment, shall only apply to the amount due by any such share or stockholder in such company, and unpaid, on or for any such share of stock."

"An Act to Amend an Act, Passed April Twelfth, Eighteen Hundred and Forty-eight, to Provide for the Incorporation and Regulation of Telegraph Companies. Passed April 19, 1855.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The eleventh section of the act passed April twelve, eighteen hundred and forty-eight, to provide for the incorporation and regulation of telegraph companies, is amended so as to read as follows:

"SEC. 11. It shall be the duty of the owner, or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch; provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association, owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent.

"SEC. 2. This act shall take effect immediately."

"An Act to Change the Name of the New York and Mississippi Valley Printing Telegraph Company. Passed April 4, 1856.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The name of 'The New York and Mississippi Valley Printing Telegraph Company,' a body corporate, organized under the general laws of this State, is hereby changed to the 'Western Union Telegraph Company;' and the said company shall have the right to continue to hold and manage the property and affairs of the said telegraph company,

as a corporation, by or under the name and style of 'The Western Union Telegraph Company.' But nothing herein shall be construed to affect any action now pending in favor of or against said company; and in case any action shall be hereafter commenced against the said company, in this State or elsewhere, by any person or party not knowing the change of the corporate name of said company, it shall not be authorized to plead a misnomer, but shall answer or plead to the merits of the action, stating in such answer the true name of said corporation; and such action shall proceed against it in either name, according to the practice of the Court in which such action shall be pending; and any judgment recovered therein shall be as valid as if the action had been commenced and conducted against the said company by its true name.

"SEC. 2. This act shall take effect immediately."

"An Act Further to Amend an Act Entitled 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' Passed April Twelfth, Eighteen Hundred and Forty-eight. Passed April 22, 1862; three-fifths being present.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. Any telegraph company which is duly incorporated under and in pursuance of the act entitled, 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, eighteen hundred and forty-eight, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining,

owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this act.

"SEC. 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall own or hold any interest in such line or lines, or shall become lessee of any such line or lines, such company, within one year after constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or after acquiring any other interest in such line or lines, shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section Two of the act hereby amended; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in subdivision five of the second section above mentioned.

"SEC. 3. Any telegraph company incorporated as mentioned in the first section of this act, which before the passing of this act shall have purchased, constructed or leased, or shall have joined with any other corporation or association in the purchase, construction or leasing, or shall have become the owner or holder of any interest in any line or lines of telegraph not described in their original certificate of organization, may, within one year after the passage of this act make and file in the office of the secretary of state such certificate as is provided in the second section of this act, and upon the filing of such certificate, their act, if otherwise within the provisions of this statute, shall be as valid and effectual as if done after the passing of this act, saving all existing rights of other persons.

"SECTION 4. This act shall take effect immediately."

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 183. Argued March 9, 1915.—Decided April 12, 1915.

Where the jurisdiction of the District Court to which the case is removed from the state court depends entirely upon diverse citizenship, the judgment of the Circuit Court of Appeals is final under § 128, Jud. Code.

Where the foundation of the right claimed is a state law, the suit to assert it arises under that law, none the less because it has attached a condition that only Federal legislature can fulfil; such a case is not one arising under the law of the United States, under § 24, Jud. Code.

Where a proceeding brought by a telegraph company, permitted to operate within the State, against a railroad company, to acquire rights by judgment expropriation which is based on the state statute, is removed to the District Court on account of diverse citizenship,

the case is not one arising under the laws of the United States simply because the telegraph company in its bill alleged that it had accepted the provisions of the Federal Post Road and Telegraph Act of July 4, 1866.

Writ of error to review, 203 Fed. Rep. 1022, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Court of Appeals and the finality of such judgments under § 128, Judicial Code, are stated in the opinion.

Mr. Victor Leovy and *Mr. John G. Johnson*, with whom *Mr. Henry L. Stone* and *Mr. George Denegre* were on the brief, for plaintiff in error.

Mr. Rush Taggart, with whom *Mr. Charles P. Fenner* and *Mr. George H. Fearons* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the Telegraph Company, originally in a state court, to acquire 'the right of use for a telegraph line over the right of way, bridges and property' of the Railroad Company, subject to the Railroad's dominant right, by 'judgment expropriation.' By an amendment filed on May 21, 1912, the Telegraph Company alleged that it had accepted the provisions of the Act of Congress of July 24, 1866 (c. 230; 14 Stat. 221; see Rev. Sts., §§ 5263, *et seq.*); but did not disclose the purpose of the allegation. The case was removed to the District Court of the United States on June 17, 1912. There was a trial, a condemnation of the right to the plaintiff upon payment of a sum fixed by verdict, and a judgment, subject to exceptions, which was affirmed without an opinion by the Circuit Court of Appeals. This statement is sufficient, or nearly so, to show that there is a question as to the jurisdiction of this court.

If the jurisdiction below was dependent entirely upon the opposite parties being citizens of different States—the Telegraph Company of New York, the Railroad of Kentucky—this writ of error must be dismissed under § 128 of the Judicial Code. Act of March 3, 1911, c. 231, 36 Stat. 1087. The only basis for any other ground of jurisdiction is the unexplained averment of acceptance of the Act of 1866. The question is whether that averment discloses such a ground.

The jurisdiction to be exercised was to expropriate by judgment. But it was well known to the Telegraph Company from a series of decisions to which it was party that the Act of 1866 was merely permissive and gave no power to exercise eminent domain. The latest decision, repeating many earlier ones, was rendered a month and a half before this amendment was filed. *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160. There was not even color of jurisdiction on the ground that the taking was by force of the Act of 1866. *West. Un. Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S. 239.

The only other that occurs to us is that, under the statutes of Louisiana as construed, the Telegraph Company could not maintain this suit if, by the law creating it, it was prohibited from operating in Louisiana, and that the power given by the Act of 1866 excluded such a prohibition and brought the Company within the benefit of the Louisiana expropriation statute. As we have said, the purpose of the allegation is not explained, and the plaintiff did not admit the necessity of resorting to laws other than those of New York for its powers. But supposing without implying that the Statute of 1866 had to be relied upon to bring the Telegraph Company within the Louisiana Act and would have that effect, still it would not be a ground of jurisdiction. If the jurisdiction of the United States court does not depend entirely upon diversity of citizenship it is because the suit arises under the laws of the

United States. Judicial Code, § 24. But when, as here, the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfil. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Ry.* v. *Massachusetts*, 207 U. S. 79, 84.

Writ of error dismissed.

MR. JUSTICE MCKENNA and MR. JUSTICE LAMAR dissent.